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No. (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PHT, INC., d/b/a POLYNESIAN HOSPITALITY TOURS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a strike by employees for the purpose of causing the discharge of a supervisory or managerial official constitutes protected concerted activity under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157.

(2) Whether an employer violates Section 8(a)(1) & (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) & (3), by discharging employees who engage in a strike for the purpose of causing the discharge of a female supervisor/manager because of her sex.

(3) Whether employees who engage in a strike for multiple purposes may lawfully be subjected to discipline where at least one of the purposes of the strike is not protected under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157.

PARTIES TO THE PROCEEDING

PHT, Inc. d/b/a Polynesian Hospitality Tours and the National Labor Relations Board were the parties to the proceedings before the United States Court of Appeals for the District of Columbia Circuit which are sought to be reviewed here. Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, AFL-CIO, the charging party before the National Labor Relations Board, did not participate in the court below.

PHT, Inc. d/b/a Polynesian Hospitality Tours is a wholly owned subsidiary of Kobayashi Travel Services, Ltd., a Hawaii based, family-owned business.

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OPINIONS BELOW

The opinion issued by the Court of Appeals is officially reported at 920 F.2d 71 (D.C. Cir. 1990); it is unofficially reported at 135 LRRM 3238 and is reproduced in Appendix A (1a) of this petition. The Decision and Order of the National Labor Relations Board was issued on November 14, 1989, is officially reported at 297 NLRB No. 30, is unofficially reported at 133 LRRM 1218 and at 117 CCH NLRB Dec. ¶ 10,442, and is reproduced in Appendix B (7a) of this petition. The Decision of the Administrative Law Judge is unreported and is reproduced in Appendix C (12a) of this petition.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1990 (104a). The petitioner, PHT, Inc. d/b/a Polynesian Hospitality Tours (PHT) filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on January 22, 1991. The court of appeals' order denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered on February 8, 1991 (102a, 103a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act

Section 2(3) of the National Labor Relations Act of 1947, 29 U.S.C. § 152(3), provides, in pertinent part, as follows:

> The term "employee" . . . shall not include . . . any individual employed as a supervisor . . . .

Section 2(5) of the National Labor Relations Act of 1947, 29 U.S.C. § 152(5), provides, in pertinent part, as follows:

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work.

Section 2(11) of the National Labor Relations Act of 1947, 29 U.S.C. § 152(11), provides, in pertinent part, as follows:

> The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or re-

sponsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

Section 7 of the National Labor Relations Act of 1947, 29 U.S.C. § 157, provides, in pertinent part, as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Section 8(a)(1) and (3) of the National Labor Relations Act of 1947, 29 U.S.C. § 158(a)(1) and (3), provides, in pertinent part, as follows:

> (a) it shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Section 8(b)(1)(B) of the National Labor Relations Act of 1947, 29 U.S.C. § 158(b)(1)(B), provides, in pertinent part, as follows:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

Section 10(c) of the National Labor Relations Act of 1947, 29 U.S.C. § 160(c), provides, in pertinent part, as follows:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served upon such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act] . . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Section 14(a) of the National Labor Relations Act of 1947, 29 U.S.C. § 164(a), provides, in pertinent part, as follows:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

Civil Rights Act of 1964

Title VII § 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), provides, in pertinent part, as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

STATEMENT OF THE CASE

This case involves the termination of 36 employees for engaging in a strike to force PHT to discharge a senior female supervisory/managerial official. The issues are: (1) whether a strike to cause the discharge of a supervisory or managerial official is protected under Section 7 of the National Labor Relations Act; (2) whether a strike to secure the discharge of such an official because of her sex is protected under the Act; and (3) if such a motive is not protected, whether the existence of other, protected motives privileges this otherwise improper or unprotected conduct.

The facts pertinent to this Petition for a Writ of Certiorari are not in dispute. On November 10, 1986 a number of PHT's employees engaged in a strike to protest the disciplinary suspension of a favored supervisor (59a), to protest certain working conditions (80a, 81a), and to force PHT to discharge its female operations manager (3a, 64a, 67a, 73a).[1] PHT attempted to resolve this dispute for several days but was unable to do so. By letter dated November 17, 1986, PHT informed the striking employees that they were being terminated as of November 10, 1986 for engaging in unprotected activities. (3a, 67a).

In adopting the Administrative Law Judge's finding that this strike was protected activity under Section 7 of the National Labor Relations Act, the Board held:

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[1] PHT's female operations manager, Gloria Sylva, was a supervisor as defined in Section 2(11) of the Act. 29 U.S.C. § 152(11). (18a). The Administrative Law Judge found that the strikers' calls for her discharge began during the first morning of the strike and continued throughout its duration. (64a).

> We agree with the judge, for all the reasons stated by him, that the work stoppage commenced by the employees on November 10, 1986, was protected by the Act. *In so finding, we note that the Board has found to be protected employees' concerted activities concerned with the selection or termination of a supervisor who has an impact on their working conditions.*

PHT, Inc., 297 NLRB No. 30 n.2 (1989) (emphasis added) (citation omitted) (8a).

In essence, the Board's position is that the Act protects *all* work stoppages to force the discharge of supervisors or other management officials who "directly affect working conditions." The Board has adhered to this basic position notwithstanding the unanimous contrary holdings of each circuit to have considered the issue over the past 28 years. Without referring specifically to the apparent gender-based motives of the employees, the Board adopted the decision of the ALJ who described these motives as "of tangential importance." (8a, 89a).

PHT petitioned the Court of Appeals for a review of the Board's Decision and Order. The Board filed a cross application for enforcement. The court denied the petition for review, and enforced the Board's order. (2a). Although the court explicitly stated that the Board's decision was supported by substantial evidence on all counts (2a, 4a, 5a, 6a), the court adopted a rationale different from that of the Board. The court reasoned that since the strike was motivated, at least in part, by protected considerations, it was not necessary to address PHT's primary argument that the strike was not protected to the extent that its purpose also was to cause PHT to terminate a high level management official. (5a). Thus the court implicitly ruled that the protected aspects of the strike insulated the employees from discipline for their unprotected demands.

The petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied without an opinion. (102a, 103a). PHT now seeks review of the judgment denying the petition for review and enforcing the Board's Order.

REASONS FOR GRANTING THE WRIT

This case presents three related issues arising under the National Labor Relations Act concerning the rights of employees who strike to force their employer to discharge a senior female management official. Each of these issues, taken both separately and together, raises important questions of federal law which have not been, but should be, settled by this Court.

The first issue is whether the Act protects an employee strike to force the discharge of any supervisory or managerial official. In addition to this question being of sufficient importance to warrant granting the writ, the decision below is in apparent conflict with the decisions of every other circuit court of appeals to have addressed this issue.

The second issue is whether an employer may discipline employees who strike to force the discharge of a female management official because of her sex. This raises significant questions concerning the Board's obligation to accommodate its interpretation of the National Labor Relations Act with the important objectives of Title VII of the Civil Rights Act of 1964. Moreover, to the extent that the decision below fails to make such an accommodation, it is in conflict with the decisions of this Court.

Finally, this case presents the issue of whether an employer may discipline employees who engage in a strike to force the discharge of a senior female management official, where there are other, protected motives for the strike. This question necessarily must be addressed if it is determined that the activities set forth in either of the preceding questions are not protected.

I. THE NATIONAL LABOR RELATIONS ACT DOES NOT PROTECT STRIKES BY EMPLOYEES FOR THE PURPOSE OF CAUSING THE DISCHARGE OF SUPERVISORY OR MANAGERIAL PERSONNEL.

For nearly 30 years the Board has adhered to its view that the Act protects *all* work stoppages to force the discharge of supervisors or other management officials who "directly affect working conditions." Until this case, every court of appeals to have considered the issue has found such work stoppages to be unprotected.[2]

The Board's current view was first articulated in *Dobbs Houses, Inc.*, 135 NLRB 885 (1962), where the Board attempted to protect a mass work stoppage to protest the firing of a favored supervisor. The Board adopted what has subsequently been described as an "all-or-nothing" test:[3] if the employees have a right to engage in any type of concerted activity, they may engage in every type of concerted activity. In the Board's view, a strike is the same as a peaceful complaint. In rejecting this all-or-nothing test, the Fifth Circuit adopted a two

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[2] *See, e.g., Abilities and Goodwill, Inc. v. NLRB*, 612 F.2d 6 (1st Cir. 1979) (21 employee walkout to protest foreman's discharge held unprotected); *NLRB v. Ford Radio & Mica Corp.*, 258 F.2d 457 (2d Cir. 1958) (23 employee walkout to protest foreman's discharge held unprotected); *NLRB v. Wallick*, 198 F.2d 477 (3rd Cir. 1952) (Court assumed that 42 employee walkout to force retention of foreman is unprotected); *Joanna Cotton Mill Co. v. NLRB*, 176 F.2d 457 (4th Cir. 1952) (Employee who circulated petition to cause removal of supervisor was lawfully discharged); *Dobbs Houses, Inc. v. NLRB*, 325 F.2d 531 (5th Cir. 1963) (16 employee work stoppage to protest discharge of assistant manager held unprotected); *American Art Clay Company v. NLRB*, 328 F.2d 88 (7th Cir. 1964) (29 employee work stoppage to protest transfer of foreman held unprotected); *NLRB v. Coal Creek Coal Co.*, 204 F.2d 579 (10th Cir. 1953) (Employee work stoppage to protest discharge of superintendent held unprotected).

[3] *E.g., Abilities and Goodwill, Inc. v. NLRB*, 612 F.2d at 9.

step analysis to determine (1) the legitimacy of the employees' interest and (2) whether the employees' actions are "reasonable." [4]

In 1964, the Seventh Circuit promptly endorsed the Fifth Circuit's analysis.[5] The Tenth Circuit adopted this analysis in 1973,[6] followed by the First Circuit in 1979,[7] the Sixth Circuit in 1986,[8] and the Second Circuit in 1990.[9] The Third and Fourth Circuits found such work stoppages to be unprotected prior to the Board's decision in *Dobbs Houses, Inc., supra.*[10]

While these courts of appeals have been unanimous in rejecting the Board's view, they have articulated the considerations differently. In *Oakes Machine Corp., supra,* the Second Circuit recently described the factors to be considered as including (1) whether the protest originated with employees rather than other supervisors; (2) whether the supervisor at issue dealt directly with the employees; (3) whether the identity of the supervisor is directly related to terms and conditions of employment; and (4) the reasonableness of the means of protest. 897 F.2d at 89. Thus, in marked contrast to the Board's simplistic analysis, the courts of appeals engage in a careful balancing of numerous considerations in determining whether particular concerted activity is protected. In the final analysis, however, no court of appeals

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[4] *Dobbs Houses, Inc. v. NLRB,* 325 F.2d 513 (5th Cir. 1963).

[5] *American Art Clay Company v. NLRB, supra; see Henning & Cheadle, Inc. v. NLRB,* 522 F.2d 1050, 1054 (7th Cir. 1975).

[6] *NLRB v. Okla-Inn,* 488 F.2d 498 (10th Cir. 1973).

[7] *Abilities and Goodwill, Inc. v. NLRB, supra.*

[8] *Squier Distributing Co. v. NLRB,* 801 F.2d 238 (6th Cir. 1986).

[9] *NLRB v. Oakes Machine Corp.,* 897 F.2d 84 (2d Cir. 1990).

[10] *NLRB v. Wallick, supra; Joanna Cotton Mill Co. v. NLRB, supra.*

has found an employee strike to cause the discharge of a supervisor to be protected.

The decision below represents the first occasion where a court of appeals has refused even to consider the fact that the purpose of a strike was to cause the discharge of a high level management official. By refusing to address PHT's primary argument, the court of appeals has indicated that it considers such objectives irrelevant to determining whether the employees' conduct is protected.[11] In essence, the court has ruled that the protected aspects of the strike privileged the employees' demands for the discharge of PHT's female operations manager. The court's analysis is in direct conflict with every other court of appeals to have considered this issue.

In 1947 Congress enacted the Taft-Hartley Act, specifically amending the National Labor Relations Act to exclude supervisors from its provisions[12] and to outlaw coercive efforts by employees to influence employers in the selection of their supervisory or managerial personnel[13] ("Taft-Hartley supervisory amendments"). The legislative history of these amendments clearly shows a generalized Congressional realization that the supervisory and managerial structure of American businesses was being jeopardized by the evolving interpretations of the National Labor Relations Act.

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[11] In its Petition for Rehearing and Suggestion for Rehearing *En Banc*, PHT argued that the court of appeals had improperly substituted its judgment for that of the Board. *See NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965); *South Prairie Construction Co. v. Local 627, IUOE*, 425 U.S. 800 (1976). By rejecting this argument the court clearly indicated that it was adopting the Board's conclusions, but that it considered the employees' efforts to cause the discharge of PHT's operations manager to be irrelevant.

[12] Section 2(3), 2(11) and 14(a) of the National Labor Relations Act, 29 U.S.C. §§ 152(3), 152(11) and 164(a).

[13] Section 8(b)(1)(B) of the Act, 29 U.S.C. § 158(b)(1)(B).

Senator Flanders, the author of a successful amendment to expand the proposed definition of the term "supervisor," [14] described the reasons for excluding supervisors from the Act:

> The reasons are simple and direct. Unless the employer can hire and discharge, promote, demote, and transfer these men, he has lost the control of his business. He cannot run it effectively. If he cannot run it effectively and efficiently, he cannot continue in business profitably. If he cannot operate profitably, he is a bad manager, not only from the stockholders' standpoint, but also from that of the working force as well.

93 Cong. Rec. S4805, *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1304 (1985) ("2 Legislative History").

Senator Ball, a member of the Senate Committee on Labor and Public Welfare and chief proponent of the bill, described the considerations of the committee:

> The committee took the position that foremen are an essential and integral part of management, and that to compel management to bargain with itself, so to speak, by dividing the loyalties of foremen between the union and the employer, simply did not make sense, and inevitably would prove harmful to the free enterprise system.

93 Cong. Rec. S5146, 2 Legislative History, at 1496.

Both the House and Senate Reports echoed similar sentiments. For example, the House Report stated:

> *Management, like labor, must have faithful agents.*— If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say

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[14] In *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974), this Court described Senator Flanders' amendment as "the only pertinent congressional action during passage." 416 U.S. at 660, n.5.

> what workers want and have a right to expect, there must be in management and loyal to it *persons not subject to influence or control of unions*, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations.

House Committee on Education and Labor, Labor Management Relations Act, 1947, H.R. Rep. No. 245, 80th Cong., 1st Sess., 16 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 307 (1985) (emphasis added).

These excerpts from the legislative history demonstrate that Congress was concerned not only with giving employers direct control of their supervisors, but also with freeing them from the "influence and control" of third parties. This latter concern was partially addressed by Section 8(b)(1)(B) of the Act, which makes it unlawful for a labor organization or its agents "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." 29 U.S.C. § 158(b)(1)(B).

The Senate Report describes the effect of Section 8(b)(1)(B):

> Thus, a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an association which negotiates labor contracts on behalf of workers; also this subsection would not permit a union to dictate who shall represent the employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.

Committee on Labor & Public Welfare, Federal Labor Relations Act of 1947, S. Rep. No. 105, 80th Cong., 1st Sess. 20, *reprinted in* 1 NLRB, Legislative History of

the Labor Management Relations Act, 1947, at 427 (1985).

However, Senator Taft, the principal sponsor of the legislation, described the considerations underlying Section 8(b)(1)(B) in somewhat different terms:

> This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, "we do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y." That has been done. It would prevent their saying to the employer, "You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work."

93 Cong. Rec. S3953, *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1012 (1985).

Thus, Section 8(b)(1)(B) addresses two distinct issues. First, it precludes a "labor organization" from dictating to an employer who it must select, or reject, as its negotiator. Second, it protects employers from coercive pressure concerning the selection or retention of its supervisors.[15] In the parlance used by the Board in defining its position below, Section 8(b)(1)(B) precludes employees from striking to affect the "selection or termination of a supervisor who has an impact on their working conditions." [16]

It is significant that the Board agrees that the Act does not protect employee efforts to influence changes in "management hierarchy." *See, e.g., Retail Clerks Un-*

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[15] While in this respect, the terms of Section 8(b)(1)(B) are limited to representatives for "the adjustment of grievances," it is clear from Senator Taft's statement that Congress considered most, if not all, supervisors to fall within its scope.

[16] Clearly, a supervisor who is responsible for "the adjustment of grievances" by definition also "has an impact" on working conditions.

ion, Local 770 Retail Clerks International Association, AFL-CIO, 208 NLRB 356 (1974). Rather, in the Board's view, the conduct [17] which is protected is that which is directed toward the selection or retention of supervisors who have "an impact" on employee working conditions. (8a). This rule would protect any strike over the identity of a foreman or any other direct supervisor. However, it is the integrity and composition of direct supervision which Congress sought to protect from employee influence in enacting the Taft-Hartley supervisory amendments.

The debate over the Taft-Hartley supervisory amendments shows that Congress was keenly aware of the risk of shifting control over supervisors from employers to employees.[18] Congress intended these amendments to reverse that shift and to vest the authority to make decisions concerning supervisory personnel exclusively with the employer.

In the proceedings below, there was apparent confusion as to how the principles of Section 8(b)(1)(B) applied to this case. Here, employees who were not represented by a union engaged in a strike to force the discharge of PHT's operations manager. The ALJ did not dispute that PHT's operations manager had grievance handling responsibilities, and he specifically found that she was a supervisor (18a) and that the employees sought her termination (64a, 67a, 73a). Notwithstanding

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[17] The Board does not distinguish between types of concerted activity. In the Board's view, a strike is the same as a peaceful complaint raised through the grievance procedure. This has been described as the Board's "all-or-nothing" or *per se* test. *See, e.g., Abilities and Goodwill, Inc. v. NLRB*, 612 F.2d 6, 9 (1st Cir. 1979); *Squier Distributing Co. v. NLRB*, 801 F.2d 238, 242 (6th Cir. 1986).

[18] The opponents of the amendments did not dispute these basic concerns. Rather they simply maintained that these objectives could be satisfied without wholly excluding supervisors from the protections of the Act.

this evidence, the Administrative Law Judge's analysis focused primarily on whether a "labor organization" was responsible (89a) and whether having the operations manager fired was the same as "having her removed as collective bargaining representative". (89a, 90a). The ALJ did not elaborate on the latter issue.

This confusion demonstrates a basic misunderstanding of the argument in the proceedings below. Section 8(b)(1)(B) is relevant not because of its literal terms, but because of the policies it represents. The question is whether the Act affirmatively protects employees who strike to force the discharge of a supervisor. While Section 8(b)(1)(B) specifically outlaws coercive efforts by "labor organizations" to remove "grievance" handlers, its genesis was a Congressional recognition that employers should not be coerced in the selection or retention of any supervisors. Thus it is not necessary to find a specific violation of Section 8(b)(1)(B) to conclude that the Act does not protect strikes to force the discharge of supervisors.

The world of concerted activity is not limited to either protected or illegal conduct. There is a vast array of conduct which is not protected by the Act, but which is not itself illegal.[19] Employees who engage in such conduct are subject to discipline without interference from the Board.[20] At a minimum, a strike to force the discharge of a supervisor falls within the scope of unprotected activity.[21]

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[19] *See, e.g., NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

[20] *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 72 (1975).

[21] Although it is not necessary to the disposition of this case, it is clear that the strike was violative of Section 8(b)(1)(B). Unorganized employees who informally join together to present grievances to their employer constitute a "labor organization" within the broad definition of Section 2(5) of the Act. *NLRB v. Kenna-*

The Board's blind adherence to its view that the Act protects such strikes notwithstanding the unanimous rejection of this view by the courts of appeals has effectively created a dual standard of federal law. Those employers who are unable or unwilling to contest the Board's view must suffer employee strikes to affect the selection or retention of their supervisory or managerial personnel. Only those employers willing to expend considerable resources to challenge the Board before the courts of appeals can obtain protection from such improper conduct.

This case presents a unique opportunity for the Court to address this critical issue. For nearly 30 years, until this case, the Board has consistently been rebuffed by the courts of appeals and has yet to seek certiorari. Apparently the Board is satisfied with the dual standard it has created. By enforcing the Board's analysis, the decision below presents the Court with an opportunity to consider the Board's view in its purest form.

The bifurcated regulatory environment created by the Board's steadfast refusal to accede to the constitutionally and statutorily superior authority of the United States Circuit Courts of Appeals has created an inconsistency in the law which the Court should now resolve. The Board's position and the decision of the court below ignore the Congressional policies underlying the Taft-Hartley supervisory amendments. This Court should review this important question of federal law and resolve the conflict between the District of Columbia Circuit Court of Appeals and the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Tenth Circuit Courts of Appeals.

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metal, Inc., 182 F.2d 817 (3rd Cir. 1950). As a "labor organization," the employees who engaged in the strike to force the discharge of PHT's operations manager violated Section 8(b)(1)(B).

II. AN EMPLOYER MAY LAWFULLY DISCHARGE EMPLOYEES WHO ENGAGE IN A STRIKE FOR THE PURPOSE OF CAUSING THE DISCHARGE OF A FEMALE SUPERVISOR/MANAGER BECAUSE OF HER SEX.

The evidence in this case clearly demonstrates that a motive propelling the strike was the employees' demand for the discharge of PHT's operations manager because she is a woman. For example, the Administrative Law Judge credited testimony that "the men were having an awful time taking orders from a woman, especially receiving discipline from a woman, because they felt uncomfortable in giving any kind of answer back and using the words that they're used to." (56a, 57a). The ALJ also found that the picketers chanted "Hidey, hidey, ho, the bitch has got to go" (64a, 65a) and called PHT's operations manager "Babe" when she approached them on the picket line (62a). Indeed, it was found that the picketers chanted "offensive, vulgar and even obscene" statements to and about her throughout the strike (66a), that the Charging Party's business manager said "we are going to call this the Gloria strike" (65a), and that one of the leading strikers said that the employees were declining to come to work because of Sylva, that they wanted her "out" (73a). A strike to secure the discharge of a supervisor because of her sex is not protected under the National Labor Relations Act.

Title VII § 703(a)(1) of the Civil Rights Act of 1964 provides, in pertinent part, as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1).

Clearly, an employer would violate this section if it were to terminate a female management official because of her sex. It would be no less of a violation of Title VII for such a gender-based discharge to be in response to the demands of employees.[22] The decision below places the employer in an untenable position—the employer could not acquiesce in the employees' demands without itself violating Title VII.

This Court has recognized that the Board is obligated to formulate remedies that comport with congressional objectives under other statutory schemes. In *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), the Court faulted the Board for ordering reinstatement and backpay to striking seaman when the order ran contrary to a federal anti-mutiny statute, stating:

> The Board has not been commissioned to effectuate the policies of the National Labor Relations Act so single-mindedly that it may wholly ignore other equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one such statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis on its immediate task.

316 U.S. at 47.

In *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975), the Court considered whether certain discharges which arguably violated Title VII of the Civil Rights Act of 1964 also violated the National Labor Relations Act. Although the

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[22] Indeed, in *Pacific Maritime Association*, 271 NLRB 1426 (1984), the Board found an employer and a union to be equally culpable under the National Labor Relations Act for the union's discriminatory practices in the operation of a hiring hall. While not specifically addressing the employer's liability under Title VII, the Board found that the employer violated Section 8(a)(1) & (3) of the Act by acquiescing in, and maintaining an illegal hiring arrangement with the union.

Court ultimately found no violation of the NLRA, it did so only after engaging in a careful balancing of the Congressional policies underlying both statutes. In this respect the Court stated:

> Plainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and it is commonplace that we must construe the NLRA in light of the broad national labor policy of which it is a part. *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-458 (1957).

420 U.S. at 66.

In the decision below, the court of appeals concluded that "substantial evidence supports the Board's factual findings as to the objectives of the employee protest." (4a). As set forth above there is ample evidence of gender-based motives for the strike. Thus, the Board's factual findings are not in issue. Rather, the question is whether the Board applied the proper law to the undisputed facts. The Administrative Law Judge reviewed all of the evidence demonstrating that the employees objections to PHT's female operations manager were gender-based. Despite this clear evidence, the ALJ did not find this motive to be relevant. As the ALJ stated:

> From all that appears, [the operations manager] was a source of much concern among employees. *Whether this was due to sexist attitudes . . . or due to her alleged favoritism and unfair labor practice activities . . . seems to me to be of only tangential importance.* What is important, in my opinion, is that there is no instance where Respondent has introduced proof tending to demonstrate that employees sought to have Sylva removed as Respondent's collective bargaining representative.[23] (89a) (emphasis added).

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[23] While the ALJ accepted the evidence that the strikers demanded that Sylva be fired, he stated, without explanation, that this was "not, in my opinion, the same thing as demanding her removal as collective bargaining representative." (89a, 90a). It is obvious,

The ALJ's confused analysis blends the evidence that the employees' concerns were gender-based with the question of whether employees, for whatever reason, may demand the discharge of a supervisor. The ALJ totally failed to consider the policies underlying Title VII of the Civil Rights Act of 1964 in determining whether their conduct was protected. The Board adopted the ALJ's analysis without comment. The court of appeals concluded this was all supported by "substantial evidence." In effect, the court also found that the gender-based motives for the protest were irrelevant.

The decisions below clearly undermine the purposes and policies of Title VII. By declining to even address the competing reasons for the strike, both the Board and the court of appeals, in effect, treat the discriminatorily motivated activity of the employees as "protected"—as if they had a right to protest with such a purpose as to remove a supervisor because she is female. *Cf. Price Waterhouse v. Hopkins*, 109 S.Ct. 1775, 57 USLW 4469 (1989). Clearly, gender discrimination was a motive propelling the strike. As a matter of law, this fact cannot be dismissed in a mere conclusory paragraph without considering the important policies of Title VII of the Civil Rights Act of 1964.

The remedial scheme of the National Labor Relations Act should not be made available to employees who act in concert to cause an employer to violate Title VII. This Court's mandate in *Southern Steamship Co., supra*, as well as *Emporium Capwell Co., supra*, requires that the NLRA be interpreted in harmony with other protected rights and congressional policies. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). Absent guidance from this Court, the Board will continue to interpret the National Labor Relations Act without regard to the equally important Congressional objectives embodied in Title VII.

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however, that if Sylva were discharged, she would no longer be PHT's representative for any purpose.

III. AN EMPLOYER MAY LAWFULLY DISCIPLINE EMPLOYEES WHO ENGAGE IN A STRIKE WHERE AT LEAST ONE OF THE PURPOSES OF THE STRIKE IS NOT PROTECTED UNDER § 7 OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 157.

Where a work stoppage has both protected and unprotected purposes, the presence of the unprotected purpose, e.g., to obtain the discharge of a supervisor, taints the protected purposes and renders the walkout unprotected. *See Dobbs Houses v. NLRB*, *supra*, at 537. As reasoned by the Fifth Circuit in *Dobbs Houses*:

> To hold otherwise would be the equivalent of justifying a strike in protest of a managerial prerogative if a working condition existed which might have been made the basis of a labor dispute. * * * It cannot be said that the presence of bad working conditions may render protected that which is otherwise unprotected.

Id.

This conclusion has been similarly reached in other cases by the Board and courts alike.[24] In the analogous

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[24] *Cf. Communications Workers, Local 2550*, 195 NLRB 945, 948 (1972) (Strike to ameliorate existing grievances over working conditions and to force the removal of group chief operator held unlawful); *Miscellaneous Warehousemen, Drivers and Helpers, Local 986*, 145 NLRB 1511 (1964) (Picketing to compel employer to remove objectionable representative is unlawful notwithstanding concurrent legal purpose to secure a satisfactory bargaining agreement); *Iodice v. Calabrese*, 345 F. Supp. 248, 261 (S.D.N.Y. 1972) (To find a violation of section 8(b)(4)(ii)(B), the evidence need not show that the unlawful object was the sole object pursued by the union, but rather, it is sufficient to find that one of the objects was unlawful); *Iodice v. Calabrese*, 512 F.2d 383, 388 (2d Cir. 1975) ("When a labor organization takes action for the purpose of forcing an employer to cease doing business with another, it violates Section 8(b)(4)(B) even if it has other purposes as well"); *McLeod v. Hempstead Local No. 1921*, 183 F. Supp. 494, 498 (E.D.N.Y. 1960) ("It is not the law that a valid object [of picketing] insulates unlaw-

factual setting addressing a Section 8(b)(1)(B) claim, the District of Columbia Circuit Court of Appeals has held:

> [E]mployees may lawfully assert their right to nondiscriminatory treatment through legal remedies as well as self-help measures protected by Section 7 so long as they protest the treatment and do not demand the removal or appointment of a particular management representative.

Laborers Int'l Union of N.A., Local 478 v. NLRB, 503 F.2d 192, 194 (D.C. Cir. 1974).

In its decision below, the court reasoned that since the strike was motivated, at least in part, by protected considerations, it was not necessary to address PHT's primary argument that the strike was not protected to the extent that its purpose also was to cause PHT to terminate its female operations manager. (5a). Thus the court implicitly ruled that the protected aspects of the strike insulated the employees from discipline for their unprotected demands.

Following this rationale, the Board's position concerning strikes to force the discharge of managerial/supervisory personnel would never be subject to judicial review. Unless one assumes that employees act for wholly irrational reasons, any work stoppage which seeks the discharge of a management official will have its genesis in some arguably "legitimate" employee complaint. The distinguishing characteristic of such a work stoppage, however, and the characteristic which makes it unlawful, is that the employees are not satisfied with protesting working conditions, but seek to compel that such conditions

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ful objects, but rather than one bad object taints the valid ones."); *International Organization of Masters, Mates and Pilots v. NLRB*, 539 F.2d 554 (5th Cir. 1976), *cert. denied*, 434 U.S. 828 (1977) (Union violated Section 8(b)(1)(B) by picketing to replace the deck officers, even though there were other possible lawful objects of picketing, including recognition).

be remedied by the termination of the offending management official. It is at this juncture that the employees cross from the realm of protected activity into the well-defined category of unprotected activity.

Moreover, if the mere articulation of a protected basis for collective action would suffice, conduct which Congress determined should remain unprotected could be elevated to protected status merely by linking it to other protected concerns. Obviously, such a rule would radically shift the delicate balance of rights and responsibilities which Congress has established in the National Labor Relations Act.[25]

The exceptional importance of the issues in this case is apparent. The factual setting of this case is the perfect environment in which to settle these questions. In effect, the court of appeals would grant the Board a license to ignore and subvert the Congressional policies underlying the Taft-Hartley supervisory amendments and Title VII of the Civil Rights Act of 1964, all in the name of protecting concerted activity. This single-minded application of the National Labor Relations Act, in derogation of the policies and purposes of other Congressional objectives, is contrary to the decisions of the overwhelming majority of the circuit courts of appeals and contravenes this Court's mandate in *Southern Steamship* that the Board tailor its remedies to accommodate other federal statutes.

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[25] *See, e.g.*, Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) ("No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.").

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment of the Court of Appeals and its judgment should be reversed.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA COURT

Argued October 25, 1990 Decided December 7, 1990

No. 89-1752

PHT, INC., D/B/A POLYNESIAN HOSPITALITY TOURS,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board

Ronald Y.K. Leong, with whom *Frederick R. Troncone* was on the brief, for petitioner.

Robert F. Mace, Attorney, National Labor Relations Board, with whom *Aileen A. Armstrong*, Deputy Associate General Counsel, and *Peter Winkler*, Supervisory Attorney, National Labor Relations Board, were on the brief, for respondent.

Before: WALD, *Chief Judge*; MIKVA and RUTH B. GINSBURG, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

PER CURIAM: Petitioner PHT, Inc. ("PHT" or the "Company") seeks review of a National Labor Relations Board (the "Board") decision holding that PHT violated

sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the "Act"), 29 U.S.C. §§ 158(a)(1), 158(a)(3) (1988), and ordering it to reinstate discharged employees. *See PHT, Inc. d/b/a Polynesian Hospitality Tours*, 297 N.L.R.B. 30 (1989). PHT objects primarily to the Board's finding that the employee work stoppage at issue here constituted protected activity under the Act, and also contests several other Board findings. We conclude that the Board's decision is supported by substantial evidence on all counts; accordingly, we deny the petition for review and enforce the Board's order.

I.

PHT provides ground transportation for tours and passenger transfers to and from airports and hotels in the Honolulu, Hawaii area. During the fall of 1986, employees expressed dissatisfaction with a variety of working conditions, including starting times, daily hours, weekend days off, uniforms, and the condition of the equipment. One of the drivers' primary complaints was that Gloria Sylva, PHT's Operations Manager, unfairly assigned the daily "runs," often on the basis of favoritism. Employee representatives presented these concerns to, and met with, company management on several occasions.

In late October, the Hawaii Teamsters and Allied Workers, Local 996 (the "Union") began an organizational campaign at the Company, having failed in a similar effort the year before. Shortly after the Union filed its representation petition with the Board, Ms. Sylva questioned several employees about their union activities. The Company also suspended a supervisor-dispatcher who actively supported the Union, and issued a "letter of counseling" to another employee, both actions taken for alleged violations of PHT's "no solicitation" rule. The Union subsequently filed an unfair labor practice charge against the Company on behalf of the suspended employee.

PHT employees engaged in a work stoppage beginning on November 10. With the exception of the first morning, the employees carried signs throughout protesting that the Company was "unfair" and that a labor dispute existed between the Company and the Union. On several different occasions, the employees shouted remarks about and to Ms. Sylva, some quite offensive, and others calling for her removal. On November 17, PHT sent discharge letters to the protesting employees, confirming earlier statements that they would be terminated if they did not return to work. The Union subsequently filed unfair labor practice charges against PHT, and the General Counsel issued a complaint.

After some twenty days of hearings, the administrative law judge (ALJ) issued a decision concluding that PHT had violated sections 8(a)(1) (interference with employees' protected rights) and 8(a)(3) (discrimination against union activity) of the Act, 29 U.S.C. §§ 158(a)(1), 158(a)(3), prior to and during the work stoppage. Specifically, the ALJ found that the employees had engaged in protected concerted activity during their work stoppage, and that the Company had therefore unlawfully discharged them. The ALJ also found that the Company violated the Act by interrogating employees, discriminatorily enforcing its "no solicitation" rule, and inducing employees to abandon their protest. On the basis of those findings, the ALJ ordered the Company to cease and desist from the unfair labor practices, and to offer immediate and unconditional reinstatement of the discharged employees. The Board in turn adopted the ALJ's decision and order, modifying them only insofar as it found additional violations of the Act and concluded that the ALJ had mischaracterized an employee as a supervisor.

II.

The Company's primary challenge is to the Board's finding that the employee work stoppage was protected concerted activity under section 7 of the Act. Section 7

guarantees employees the right to engage in union activity, as well as "other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Employee protests to improve working conditions have long been held protected activity, *see NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962), as have protests against an employer's unfair labor practices. *See Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). Section 8(a)(1) implements the guarantees of section 7 by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce" employees exercising those protected rights. 29 U.S.C. § 158(a)(1). *See Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 952 (D.C. Cir. 1988). In those cases where the employer's actions are motivated by anti-union animus, section 8(a)(3) of the Act is also implicated. 29 U.S.C. § 158(a)(3).

PHT argues that the real objective of the employees' work stoppage was Ms. Sylva's removal, and that section 7 does not protect employee protests concerning the composition of management personnel. Suggesting, moreover, that the employees sought Ms. Sylva's removal on account of her gender, PHT argues that section 7 does not protect protests that are discriminatory in motive. Hence, PHT claims, it lawfully discharged the protesting employees.

In examining PHT's claims, we are mindful that the Board's determinations may be disturbed only if "its factual findings are not supported by substantial evidence or it has acted arbitrarily or otherwise erred in applying established law to the facts at issue." *North Bay Development Disabilities Services, Inc. v. NLRB*, 905 F.2d 476, 478 (D.C. Cir. 1990) (internal quotation omitted). We conclude that substantial evidence supports the Board's factual findings as to the objectives of the employee protest, and, consequently, we agree with the Board that the protest constituted protected activity.

The ALJ found that "there is ample evidence in this record to sustain a conclusion, which I make, that employees were engaged in union and/or protected concerted activities," *see PHT, Inc. v. Hawaii Teamsters and Allied Workers Local 996*, at 49 (ALJ October 27, 1988) (appended to 297 N.L.R.B. 30) (hereinafter "ALJ Opinion"), and went on to find that "[t]he employees were acting in concert to protest, and seek redress of, complaints about certain of their wages, hours and working conditions." ALJ Opinion at 50. As examples of other factors contributing to the protest, the ALJ cited the employees' "perception that an unfair labor practice had been committed," and noted that "certain activities by management officials . . . were regarded by employees as harassment." ALJ Opinion at 53-54.

The Board "affirm[ed] the judge's rulings, findings, and conclusions," noting its "agree[ment] with the judge, for all the reasons stated by him, that the work stoppage commenced by the employees on November 10, 1986, was protected by the Act." *PHT, Inc.*, 297 N.L.R.B. 30, at 1-2 & n.2.

We believe that substantial evidence supports the Board's finding that the employees engaged in the stoppage to protest working conditions and perceived unfair labor practices committed by the Company. Accordingly, the Board correctly concluded that the work stoppage constituted protected concerted activity, and that PHT violated the Act in discharging the employees. We thus see no reason to reach, and hence express no opinion on, the section 7 status of protests relating to the selection, discharge, or replacement of supervisory personnel.

III.

PHT challenges several other aspects of the Board's decision. Specifically, the Company contends that: (1) the work stoppage was nevertheless unprotected because (a)

the employees violated section 8(b)(1)(B) of the Act, which makes it unlawful for a union or its agents to interfere with an employer's selection of its bargaining representatives, 29 U.S.C. § 158(b)(1)(B), and (b) the employees failed to disclose the purpose of the stoppage; (2) the Board erred in finding PHT's washcrew co-chief to be an employee instead of a supervisor; and (3) the Board erred in holding that the Company violated sections 8(a)(1) and 8(a)(3) by interrogating employees, coercing them to abandon their protest, sending discharge letters, and discriminatorily enforcing its "no solicitation" policy. We conclude, however, that substantial evidence supports each of the Board's findings. *See* ALJ Opinion at 55-56 (interference with employer representatives); ALJ Opinion at 34-35 & n.26, 45, 49-50 (PHT knowledge of employee protest); *PHT, Inc.*, 297 N.L.R.B. 30, at 2-4 (supervisory status); ALJ Opinion at 42-44 (interrogations); ALJ Opinion at 44-46 (interrogation and coercion to abandon protest); 297 N.L.R.B. 30, at 1-2 n.1, ALJ Opinion at 51 (discharge letters); ALJ Opinion at 47-49 (discriminatory enforcement of "no solicitation" policy).

IV.

Finding substantial evidence to support the Board's decision, we deny the petition for review and enforce the Board's order.

It is so ordered.

APPENDIX B

297 NLRB No. 30

D-1029
Honolulu, HI

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 37-CA-2443
37-CA-2453
37-CA-2467

PHT, INC., d/b/a
POLYNESIAN HOSPITALITY TOURS

and

HAWAII TEAMSTERS and ALLIED WORKERS LOCAL 996,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, AFL-CIO

DECISION AND ORDER

On October 27, 1988, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions, amended exceptions, a supporting brief, and a brief in answer to the General Counsel's cross-exceptions; the General Counsel filed cross-exceptions and a supporting brief, and a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions, cross-exceptions, and briefs and

has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order as modified.

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[1] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel has excepted to the judge's failure to find that Operations Manager Sylva's oral threats of termination and the letters sent to employees ratifying their termination were independent violations of Sec. 8(a)(1). We find merit in this exception. We agree that the threats independently violated the Act because they would reasonably tend to discourage employees from continuing to exercise their Sec. 7 rights, and the letters memorializing the terminations underscored the effects of the threats.

The General Counsel has also excepted to the judge's failure to find that the Respondent independently violated Sec. 8(a)(1) by selectively enforcing its no-solicitation/no-distribution rule against union activities while simultaneously failing to enforce it against other types of solicitations. We find merit in this exception. The judge found that although the Respondent disciplined employee Fujihana for soliciting for the Union at an airport staging area, the Respondent placed no other restrictions on employee discussion. Further, the judge found that although the Respondent disciplined Fujihana for soliciting for the Union, it admittedly did not discipline him for his distribution of betting slips to employees of which it was aware. Moreover, the judge noted the wide range of solicitation and distribution at the Respondent's premises. Sylva, herself, admitted that she knew of and tolerated sales of various food products, etc., among employees. Thus, we find that, by disciplining employees for solicitation and distribution on the Union's behalf while allowing solicitation and distribution for nonunion purposes, the Respondent has violated Sec. 8(a)(1) of the Act. *K & M Electronics*, 283 NLRB 279, 279 (1987).

[2] We agree with the judge, for all the reasons stated by him, that the work stoppage commenced by the employees on November 10, 1986, was protected by the Act. In so finding, we note that the Board has found to be protected employees' concerted activities concerned with the selection or termination of a supervisor who has an impact on their working conditions. *Hoytuck Corp.*, 285 NLRB

1. The judge found that Kekuewa, cochief of the Respondent's washcrew and an alleged discriminatee, is a supervisor within the meaning of Section 2(11) of the Act. The General Counsel has excepted, contending that Kekuewa exercises no independent judgment in carrying out his duties. We find merit in this exception.[3]

While the washcrew cleans the vehicles according to a list obtained from the dispatcher, Kekuewa and his cochief observe the work of the crew to ascertain that the crew works steadily rather than "goofs off." The cochiefs are also responsible for parking the vehicles. Kekuewa's testimony indicates that the members of the crew know their jobs well and need little supervision. He also testified that he communicated with the crew, whose language he does not speak, by banging on a bus to get their attention and pointing to the job they were to do. Kekuewa conceded that Operations Manager Sylva informed Kekuewa after a representation hearing in 1985 that he was a supervisor and that he could be disciplined for encouraging employees to support the Union. On one occasion, when Kekuewa informed Sylva that an employed had failed to follow his directions, Sylva told the employee that Kekuewa was his supervisor and that the employee should follow his instructions. Based on this evidence, the judge found Kekuewa to be a supervisor.

No. 120 (Sept. 18, 1987). In this case it is abundantly clear from Sylva's own testimony that her performance of her duties as operations manager directly affected the working conditions of unit employees.

[3] In adopting the judge's findings that William Kahihikolo and Douglas Wong, the Respondent's dispatchers, are statutory supervisors, we do not rely on the judge's finding that Kahihikolo was authorized to pledge the Respondent's credit. Regarding Wong, the General Counsel contends that the judge erred in relying on a portion of Wong's testimony which the judge interpreted as averring that Wong made changes in employees' schedules only about once or twice a month. The General Counsel argues that the judge has misinterpreted the testimony. We do not rely on the judge's analysis of this testimony.

Contrary to the judge, we find the record insufficient to establish that Kekuewa is a statutory supervisor. Initially, we note that an employer's holding out an individual to employees as a supervisor is not necessarily dispositive of supervisory status. *Adair Standish Corp.*, 290 NLRB No. 43, JD slip op. at 6-7 (July 29, 1988). In this regard, despite the above incidents in which Sylva indicated to both Kekuewa and another employee that the Respondent viewed Kekuewa as a supervisor, we find the record devoid of evidence that Kekuewa exercised the independent judgment essential to a finding of supervisory status under the Act, or indeed that Kekuewa possessed any of the primary indicia of supervisory status. Thus, the record contains no evidence that Kekuewa's direction of the work of the washcrew or his authority to tell employees to get back to work if they are malingering or sleeping goes beyond the routine direction of simple tasks or the issuance of low level orders that the Board has found does not constitute supervisory authority. *Black Kettle Ltd.*, 263 NLRB 380, 385 (1982). We therefore find that the record does not establish that Kekuewa is a statutory supervisor. Accordingly, we further conclude that the discharge of Kekuewa for participating in the employee work stoppage violated Section 8(a)(3) and (1) of the Act.[4]

2. The judge inadvertently failed to recommend that the Respondent be ordered to pay interest on the make-whole remedy. We shall modify the recommended Order accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, PHT, Inc., d/b/a Polynesian Hospitality Tours, Honolulu, Hawaii, shall take the action set forth in the Order as modified.

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[4] In view of the judge's inclusion of Kekuewa, albeit inadvertent in his recommended Order, no modification to this aspect of his Order is necessary.

1. Substitute the following for paragraph 1(a).

"(a) Interrogating employees; threatening to discharge employees; inducing employees to abandon a strike; disciplining employees for engaging in protected concerted activities or union activities; discriminatorily enforcing a no solicitation/no distribution rule against union activities; or discharging employees because said employees have engaged in union or other protected concerted activities."

2. Substitute the following for the first sentence of paragraph 2(a).

"Offer immediate and unconditional reinstatement to their former positions of employment to those employees discharged on November 10, 1986, and make them whole, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), for any loss of earnings suffered by reason of the unlawful discrimination against them."

Dated, Washington, D.C. November 14, 1989

JAMES M. STEPHENS, Chairman

MARY MILLER CRACRAFT, Member

DENNIS M. DEVANEY, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX C

JD(SF)-122-88
Honolulu, Hawaii

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
San Francisco, California

Case 37-CA-2443
37-CA-2453
37-CA-2467

P.H.T., INC. d/b/a
POLYNESIAN HOSPITALITY TOURS

and

HAWAII TEAMSTERS AND ALLIED WORKERS LOCAL 996,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA, AFL-CIO*

Wanda L. Pate, Atty., of Honolulu, HI, for the General Counsel.

Ronald Y. K. Leong and *Cheryl K. Kakazu, Attys.*, of the firm of Kobayashi, Watanabe, Sugita, Kawashima & Goda of Honolulu, HI for the Respondent.

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* On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the Union's name has been amended to reflect the change.

James A. Kellogg, of Honolulu, HI, for the Charging Party

FREDERICK C. HERZOG, Administrative Law Judge

Decision

Statement of the Case

This case was heard before me in trial at Honolulu, HI, on February 24-27, March 2-6, March 9-10, March 23-27 and March 30 through April 2, 1987. It is based upon charges filed by Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Union) on or about October 27 and November 21, 1986 and January 2, 1987, respectively. These charges alleged, generally, that P.H.T., Inc. d/b/a Polynesian Hospitailty Tours (Respondent) committed certain violations of Section 8(a)(5), (3) and (1) of the National Labor Relations Act (Act). On or about December 22, 1986 the Regional Director for Region 20 of the National Labor Relations Board Board) issued an order Consolidating Complaint, Consolidated Complaint, and Notice of Hearing in Cases No. 37-CA-2443 and 37-CA-2453. On or about February 4, 1987 the same Regional Director issued a Second Order Consolidating Cases, Consolidated Complaint and Notice of Hearing. Collectively the consolidated complaints, as further amended during the trial, alleged violations of Section 8(a)(5), (3) and (1) of the Act. Respondent filed timely Answers to the allegations contained within the consolidated complaints.

All parties appeared at the hearing and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by Counsel for the General Counsel and

Counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following findings:

Findings of Fact

I. Business of Respondent

The parties agree, and I find, that Respondent is a Hawaii corporation, with its office and place of business in Honolulu, engaged in the business of providing ground transportation for tours and transfers; that during the calendar year preceding issuance of the initial complaint herein, Respondent in the course of conduct of such business, derived gross revenues in excess of $500,000; that during that same year and from the same business Respondent purchased and received at its Honolulu facility goods and materials valued in excess of $50,000 directly from the outside the State of Hawaii; and that Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization

The parties agree,[1] and I find, that the Union is now, and has been at all material times herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. General Background

Respondent is a wholly owned subsidiary of Kobayashi Travel Services Ltd. (KTS)[2] Respondent's directors are

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[1] Notwithstanding Respondent's initial denial of this allegation in its answer, it was clear from Respondent's other statements and actions that it did not seriously dispute this allegation, which comports with the finding in a Decision and Direction of Election issued previously. Thus, Respondent ultimately stipulated to the truth of this allegation.

[2] This factual summary is in accord with facts stipulated by the parties at the trial, and as more fully set forth in the Decision

Hichiro Kobayashi, Kanae Kobayshi and Tatsukichi Kobayashi. Respondent's president and chief executive officer is Michael Kobayashi and its secretary-treasurer is Lawson Teshima.

Essentially, Respondent operates as a division of KTS, serving to provide ground transportation, referred to as "passenger transfers," to and from airports, to and from hotels, on tours, and general transportation. It is one of four such companies operating in and around Honolulu. The employees involved in this case are primarily drivers of busses or minibuses and tour narrators. On some of the tours the driver also served as the narrators and are classified as English-speaking drivers (ESD) or as Japanese-speaking drivers (JSD). Others among the drivers are incapable of providing either English or foreign language narration, thus requiring that most of their tours be accompanied by "coordinators" or "tour guides", who provide narration for the tour group.

Again speaking generally, Respondent's "clients" are not the passengers which it transports, but, instead, the travel agents who book the passengers with Respondent for tours, transfers and general transportation. Thus, the majority of runs for any given day are booked the night before, when the travel agents provide Respondent with confirmation of their bookings.

Respondent's general procedure was to have employees call in by telephone to find out what was scheduled, and to learn their respective work schedules for each work day. Employees were usually hourly paid, with the rate being based primarily upon the length of their tenure with Respondent, and with no premium being paid for any language skills possessed by the employee.

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and Direction of Election in Case 37-RC-2825, dated September 12, 1985, in which it was found that Respondent and KTS constitute a single employer, and that an appropriate unit should include employees of both Respondent and KTS.

This case represents the first instance in which Respondent has been charged with commission of unfair labor practices. And, while Respondent's employees have never been represented for collective bargaining purposes, it should be noted that the Union filed a representation petition with the Board in the summer of 1985.[3] A representation hearing was held on August 12, 1985 and the Regional Director's Decision and Direction of Election, referred to earlier herein, issued on September 12, 1985. As directed, an election was held thereafter on October 8, 1985. By a vote of 64 to 29 the affected employees chose to remain unrepresented by a union. No objections to conduct affecting the results of the election were filed and the results of the election were subsequently certified.

On October 22, 1986 the Union filed another petition for representation.[4] However, before investigation of the petition had been completed, on October 27, 1986 the Union filed the charge in Case 37-Ca-2443, which had the effect of blocking further processing of the representation petition.[5] The charge in Case 37-CA-2443 alleged, generally speaking, that employees of Respondent were being coerced and that a union adherent, William Kahihikolo (sometimes referred to throughout these proceedings simply as "Kolo") had been unlawfully suspended by Respondent for soliciting other employees to join him in seeking union representation.

On November 10, 1986 there was a labor dispute at Respondent's premises. The nature and extent of the actions carried out by employees, managers of Respondent, and union officials during the course of this dispute is hotly contested by the parties to this case. Suffice it at

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[3] Case 37-RC-2825.

[4] Case 37-RC-2871.

[5] Evidently a request to proceed was once filed, but later withdrawn by the Union.

this point to state that, growing out of this dispute, Respondent terminated the employment of many of its employees.

As a result, on or about November 21, 1986 the charge in case 37-CA-2453 was filed alleging generally that Respondent had discharged employees on November 10, 1986 due to their participation in union activity.

The union's subsequent charge in Case 37-CA-2467, filed on January 2, 1987, alleged generally that Respondent violated Section 8(a)(1) and (5) of the Act by interrogating employees, and went on to request the issuance of a bargaining order by the Board based upon its claims that it represented a majority of employees in the unit and that the nature and severity of Respondent's unfair labor practices made it doubtful that employees could freely vote for the representative of their choice.

Thereafter, as previously stated, a second order consolidating cases, consolidated complaint and notice of hearing involving Cases 37-CA-2433, 2453 and 2467 was issued by the Regional Director, and the issues raised therein, as well as the amendments thereto during the trial, were tried by me on various dates in February, March and April, 1987.

B. Stipulations of the Parties Concerning the Unit the Employee Complement, and Management Officials

In the course of the trial the parties stipulated that the following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the National Labor Relations Act:

> All full-time and part-time employees of (Respondent) and (KTS) in the classifications of maintenance persons, wash persons, tour guides and tour coordinators, drivers, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

Further, it was stipulated that the parties remain in dispute concerning the inclusion or exclusion of the following employees in the stipulated bargaining unit, but that said employees held the following job classifications and received the indicated wage rates as of October 29 and November 10, 1986:

1. William Kahihikolo, dispatcher, $8.75 per hour;
2. Doug Wong, dispatcher, $8.00 per hour;
3. William Kekuewa, Co-Chief, Washcrew, $4.35 per hour.

Additionally, it was stipulated by the parties that on October 29, 1986 and November 10, 1986 Respondent employed the employees listed (together with their classification and wage rate) in Appendix B hereto.

Thus, summarizing from these stipulations, it is seen that Respondent employed either as many as 97 (as contended by counsel for the General Counsel and the Charging Party) or as few as 94 employees as contended by Respondent) in the stipulated unit at relevant times herein.

Finally, the parties stipulated that on October 29, 1986 and November 10, 1986 the following named persons occupied the positions set forth below and that these persons are supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act, earning the following salaries:

Michael Kobayashi	—	President
Gloria Sylva	—	Administrative Assistant
Richard Mitsunaga	—	Operations Management
Wesley Keahouhou	—	Chief Dispatcher
Bill Busche	—	Assistant Chief Dispatcher

C. Issues Presented

The principal issues in this case are as follows:

(1) Whether employees of Respondent engaged in protected, concerted and/or union activities;

(2) If so, whether Respondent thereafter engaged in violations of Section 8(a)(1) and (3) of the Act;

(3) Whether Respondent promulgated and/or unlawfully enforced a no-solicitation/no-distribution rule;

(4) Whether certain persons were employees instead of supervisors;

(5) Whether the authorization cards which were obtained from employees by the persons claimed to be supervisors are tainted and should not be counted in the reckoning of whether or not the Union ever attained majority status;

(6) Whether, and, if so, when the Union ever attained majority status among an appropriate unit of employees for purposes of collective bargaining;

(7) Whether the Union made a timely and appropriate demand for recognition from the Respondent;

(8) What was the nature of the employees' actions while engaging in a work stoppage on November 10, 1986 and thereafter;

(9) Whether Respondent unlawfully disengaged employees in response to their work stoppage of November 10, 1986;

(10) Whether employees engaged in misconduct sufficient to bar them from reinstatement;

(11 Whether or not a bargaining order should be granted in favor of the Union, particularly upon consideration of certain claimed misconduct.

The Supervisory Issues

(1) *General Statement of Contentions of the Parties*

The Respondent contends that its two regular dispatchers and its two washcrew co-chiefs are statutory supervisors. Counsel for the General Counsel and the Charging Party take the opposite view.[6]

(2) *Applicable Principles*

Under Section 2(11) of the Act, the term "supervisor" includes:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a

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[6] The evidence adduced on was extensive, even prolix, literally covering thousands of pages of transcript and documents. The parties' "briefs" added several hundred more pages of information to be considered.

I shall be more succinct. And, though my factual findings are indeed based upon careful consideration and weighing of the record as a whole, and my observation of the demeanor of the witnesses, my recitation of these facts and resolutions does not contain detailed references to all of the evidence. My credibility resolutions similarly are not detailed in every instance. They have, however, uniformly been derived from a complete and exhaustive review of the record, the demeanor of witnesses, and with due regard for the teachings of *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404 (1962). In certain instances I set forth my reasons for credibility resolutions in detail, while in others I have chosen to allow the resolution to appear from the fact that I recite, as fact, certain testimony, or inferences arising therefrom, which necessarily varies from or contradicts other testimonial or documentary evidence which I, apparently and obviously, found incredible and unworthy of belief.

merely routine or clerical nature, but requires the use of independent judgment.

Written in the disjunctive, the Act must be interpreted as meaning that proof of the possession of any one of the powers and functions enumerated in Section 2(11) is sufficient to establish supervisory status. *National Welders Supply Co.*, 129 NLRB 514 (1960). However, one must give due deference to the Act's requirement of "independent judgment," "responsible" direction, and "effective" recommendation in order to avoid an overly mechanistic construction of the Act. See, for example, *Bay Area-Los Angeles Express*, 275 NLRB 1063, loc. cit. 1073 (1985), and cases cited therein. Supervisory status is not conferred by virtue of the existence of authority to assign or direct other employees if in doing so the supervisor has acted pursuant to standing instructions in an "almost predigested environment," belying any claim of true decisional independence or responsibility, as opposed to the exercise of mere clerical or routine discretion and authority. Cf. *Pacemaker Driver Service*, 269 NLRB 971 (1984); *Walla Walla Union-Bulletin v. NLRB*, 631 F.2d 609, 613 (9th Cir. 1980). Nor are isolated or infrequent incidents of apparent supervision sufficient basis to elevate a rank-and-file employee to supervisory level. *NLRB v. Doctors' Hospital of Modesto*, 489 F.2d 772, 776 (9th Cir. 1973).

For, "[i]t is important for the Board not to construe supervisory status too broadly, for a worker who is deemed a supervisor loses his organizational rights." *McDonald Douglas Corp. v. NLRB*, 655 F.2d 932 (9th Cir. 1981).[7] And, "[t]he Board has a duty to employees to

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[7] The point is of great importance in this case. For not only are the organizational rights of the alleged supervisors affected by how their status is decided, but also the rights of each and every other employee in the unit. This is so because of the fact that a great many of the authorization cards obtained by the Union were solicited and/or collected by an alleged supervisor. If those cards were

be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." *Westinghouse House Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970); accord *Warner Co. v. NLRB*, 365 F.2d 435, 437 (3rd Cir. 1966).

Thus, the Board has in the past, depending upon the facts peculiar to the case before it, sometimes determined that "dispatchers" *are* statutory supervisors, (e.g. *Connecticut Distributors, Inc.*, 255 NLRB 1255 (1981)), and sometimes decided, with equal forcefulness, that "dispatchers" *are not* statutory supervisors, (e.g. *Spector Freight System, Inc.*, 216 NLRB 551 (1975); *Fisher Foods, Inc.*, 245 NLRB 685 (1979)).[8]

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solicited by a statutory supervisory, they may be deemed "tainted", as having possibly been obtained by coercion, and may possibly not to be counted in determining whether or not the Union ever came to represent a majority of the employees in the unit. *Sarah Newman Nursing Home*, 270 NLRB 663 (1984); *Reeves Brothers, Inc.*, 277 NLRB 1568 (1986).

[8] In its brief Respondent seems to argue that no case-by-case approach is permissible, and that I have no discretion but to allow the holding in *Gray Line Tours, Inc.*, 461 F.2d 763 (9th Cir. 1972), which reversed the Board's holding in *Gray Line Tours, Inc.*, 183 NLRB 153 (1970), and determined "dispatchers" of a tour bus company to be statutory supervisors, based upon "uncontroverted testimony" at the NLRB hearing to the effect that such dispatchers possessed certain supervisor powers.

I disagree. Firstly, where the Board's view is known I am bound to follow it, rather than a contrary ruling of a Federal Circuit Court of Appeals, so long as the Supreme Court is silent on the point. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963); *Ford Motor Company (Chicago Stamping Plant)*, 230 NLRB 716, at note 12 (1977) and cases cited therein. Secondly, respectfully noted, the Court's decision is plainly wrong, as it is premised upon facts which could not have occurred (e.g. the Board's decision, which the Court was asked to enforce, grew from a motion for summary judgment. Thus, there could not have been a "hearing" where "uncontroverted testimony" was given. Apparently, the Court mistakenly relied upon the record of a prior representation case in-

Uniformly, however, the Board has required that the party alleging the existence of supervisory status bear the burden of its proof. *Thayer Dairy Company*, 233 NLRB 1383 (1977); *Tucson Gas & Electric Co.*, 241 NLRB 181, and cases cited therein.

(3) *The Dispatchers*

a. General Overview of the Jobs

Respondent is structured so that its president, Michael Kobayashi, (known as M.K.) reports directly to the Board of Directors, all of whom are evidently older members of his family. M.K. is assisted by Lawson Teshima, the Secretary-Treasurer. From January 1985 until November 1986 a woman named Gloria Sylva served as Respondent's Operations Manager and Administrative Assistant. Beginning in mid-September 1986 M.K. caused Sylva to begin training someone to replace her in a few months, a man named Richard "Mits" Mitsunaga; M.K. planned to, and did, eventually transfer Sylva to another job in a different corporation owned by his family.

Respondent had a man named Wesley "Wes" Keahouhou serving in the position of Chief Dispatcher. Another man, William "Bill" Busche, occupied the postion of Assistant Chief Dispatcher.

Beneath all this structure the Respondent employed two men as dispatchers. William "Kolo" Kahihikolo was frequently referred to as the "day shift dispatcher," and Douiglas "Dougie" Wong was referred to as "the night shift dispatcher", notwithstanding the fact that each has many times worked the other's shift.[9]

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volving the same parties. If so, the Court evidently failed to take into account the fact that such hearings are not adversarial in nature, but are merely investigatory, and are not conducted with great regard for rules of procedure or evidence.

[9] Relief dispatchers appear to have been recruited from among the compliment of drivers.

The two positions are functionally indistinguishable, though the day shift is generally much busier, and, as noted later herein, the two men were, in fact, treated differently. Both dispatchers were required to punch a time clock, were paid by the hour, received the same benefits and were subject to the same rules and policies as employees who Respondent admits were nonsupervisory.

Since Respondent's earliest pickup was usually around 6:00 a.m., the day shift dispatcher generally started his workday around 5:30 a.m., and worked until around 3:00 p.m.,[10] at which time the night shift dispatcher would take over and work until around 10:00 or 11:00 p.m.

While the record is not entirely clear about the matter, I gained the impression that the dispatcher(s) worked in an office, at least partially surrounded by glass, enabling the dispatcher(s) to see adjoining rooms or corridors where other employees came and went, while punching in or out on the time clock, and while picking up their dispatch or assignment sheets. My impression was that the dispatcher's office had one or more desks, as well as space for telephone(s) and radio equipment; in recent months it also had at least one terminal for a computer which was installed by the Respondent and placed in service in the spring of 1986.

Work assignments for drivers and narrators were made, so far as possible, in the early evening of the day preceding each assignment. Scheduling of assignments of employees and equipment was a task reserved to management officials, such as Sylva, Mitsunaga, Keahouhou, Busche, and M.K. Dispatchers Kahihikolo and Wong are admitted by Respondent to have played no part in its initial phase. The schedule prepared by the managers named above was then used by the night dispatcher to

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[10] Kahihikolo was entrusted with a key to the Respondents' facility. I presume this was to enable him to open it if he arrived in the morning before anyone else.

relay information to individual employees about their respective assignment(s) and hours of work for the following day. Employees were expected to telephone the dispatcher each evening and ask him about their assignments for the following day; the dispatcher then checked the assignments scheduled earlier as described above, and relayed the information set out on the schedule to the calling employee.

The schedulers, however, frequently found themselves unable to forsee during the previous evening just how matters would stand as the following day wore one. Consequently, they generally left some bookings unassigned, or "open." The effect of this practice was that all such "open" bookings required assignment during the course of the following workday.

Additionally, assignments required changes from time to time because of other factors which could not be accurately forseen, such as new bookings, cancelled bookings, employee absences due to illness or other causes, equipment malfunction, and the like. Indeed there is evidence that assignments were even made or change sometimes in order to accommodate an employee's personal desires, or to reward an employee.

Occasionally Respondent's business became overloaded, due to factors such as last minute bookings, employee absences or equipment failure. Whenever this happened it became necessary for Respondent to contact one of its competitors, in an effort to "farm out," or subcontract, whatever business it found itself unable to handle.

When making decisions about the assignment of "open" bookings, or in making reassignments, Respondent took a number of factors into account. Among them was whether or not the assignment could be made to a driver or narrator without incurring an obligation for overtime pay. Also, the driver's or narrator's equipment and language skills had to be taken into account and matched correctly with the assignment.

b. Respondent's Claims Regarding Dispatchers

Respondent claims here that Kahihikolo and Wong are supervisors because, so it says, they possessed and exercised certain of the powers enumerated in the statute as being demonstrative of supervisory status. While tacitly admitting that Wong has seldom exercised most of these powers,[11] Respondent still asserts that because the jobs of the day and night shift supervisors are virtually interchangeable, and since each has performed the other's job from time to time, the supervisory powers exhibited by Kahihikolo in performing his job must be imputed as well to Wong. In the same vein, Respondent cites well established authority for the rule that it is the possession of supervisory authority, rather than its exercise, which is determinative. Cf. *Sarah Newman Nursing Home*, 270 NLRB 663 (1984).

Respondent makes no claim that either dispatcher possessed the power independently to hire, fire, suspend, lay off, recall, promote, reward or discipline employees. It does claim, and therefore bears the burden of proving, that both Kahikolo and Wong possessed authority to effectively recommend hiring and promotion of employees, and to effectively recommend discipline of employees. Respondent further asserts that they possessed authority the power to incur debt for Respondent. Finally, Respondent claims that each possessed, and regularly exercised, authority to assign work to and responsibly direct the work of employees.

c. Evidence and Findings Regarding Each Claim

i. Power to Hire, Rehire and/or Promote:

Respondent claims that Kahihikolo effectively recommended the hiring of an employee named Wayne Lackno,

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[11] This tacit admission is of some interest because, as Sylvia admitted, the reason Wong seldom exercised any alleged supervisory authority was that *he preferred not to do so, and chose not to "get involved."* (Emphasis added).

and subsequently in his promotion, as well as in the hiring of employees Rodney Doversola, John Castello and Derek Lariosa.

Sylva testified that Lackno was hired July 25, 1985 based solely on Kahihikolo's recommendation of the day before, and that she never interviewed Lackno or even approved of his hiring. Kahihikolo, in general, denied Sylva's version, and claimed that all he had done was pass information on to Lackno, with whom he's formerly worked at another employer, and to Respondent concerning the question of whether he thought Lackno would be a good or a bad employee.

Yet Kahihikolo was confronted upon cross-examination by an affidavit he had previously given, apparently to an investigating agent of the Board. In that affidavit he had flatly stated that he had recommended the hiring of Lackno. Counsel for the General Counsel sought to rehabilitate the testimony of Kahihikolo on this point by eliciting testimony from him concerning the meaning that he assigned to the word "recommend." My sense of Kahihikolo's testimony subsequent thereto, and the argument made by counsel for the General Counsel, is that Kahihikolo meant no precise or legalistic use of the word "recommend" at the time his affidavit was taken, and that the word was, from Kahihikolo's and her standpoint, one that had been improvidently supplied by the investigating agent for the Board, rather than Kahihikolo. My observation of this testimony makes me agree with Counsel for the General Counsel's viewpoint.

Many of the same points were made by the parties regarding a subsequent promotion (assuming, for the moment, that it should properly be termed a "promotion") allegedly recommended by Kahihikolo for Lackno from the position of "driver" to the position of "relief dispatcher".

Respondent sought to bolster its position by means of documentation drawn up by Sylva, and by the introduc-

tion of Lackno's application. Sylva's documentation shows that Kahihikolo "recommended" Lackno, and Lackno's application shows that he was referred by Kahihikolo.

Yet I must note that the allegedly corroborative documentation is nothing more than a handwritten memo by Sylva, that it has obvious self-serving properties, that it could have been drawn up at any time; that Kahihikolo has not been shown to have ever seen or approved of it, and that, on its face, it shows that there was (contrary to Sylva's testimony) some "follow-up" done by some unknown person. Thus the documentation cannot be said, in my view, to be sufficiently reliable to aid Respondent's point of view on the matter. Similarly, the fact that the application, which was made out by Lackno, shows that he was referred to the job by Kahihikolo, is of no persuasive value to me in dealing with the question of whether or not Kahihikolo "*effectively* recommended" that Lackno be hired.

Of some persuasive value to the contrary is the fact that, as counsel for the General Counsel points out, Tatsukichi Kobayashi served as the general manager for Respondent until early 1986, and that Michael Kobayashi testified during the 1985 representation case hearing that Tatsukichi Kobayashi reserved decisions on hiring to himself. Thus, since Lackno (as well as Doversola and Castello, whose discussion follows) appears to have been hired during the time period when Tatsukichi Kobayashi reserved such decisions to himself, it seems scarcely surprising to me that Sylva could testify, as she did, that she had no input into the decision as to whether or not Lackno would or would not be hired. However, it also appears clear that she had no basis to go further and testify that Lackno's hiring resulted solely from Kahihikolo's recommendation, for a simple examination of Lackno's application for employment demonstrates that he was highly qualified not only to be a driver but a dispatcher as well.

Respondent also sought to demonstrate that driver Rodney Doversola was recommended for hire by Kahihikolo. However, as with Lackno, the documentation supplied by Sylva shows that there was follow-up work done upon Doversola's application. Once again, I find it unpersuasive that Doversola has listed Kahihikolo upon that application as a reference for the job that he sought by filing the application.

Again, Kahihikolo initially denied recommending Doversola, but eventually recalled that Sylva had inquired of him about Doversola and that he had told her that Doversola was "a good worker." As with Lackno, extensive examination of Kahihikolo as to the meaning assigned by him to the word "recommend" led to no definite conclusion. At various times during his testimony Kahihikolo appeared to be conceding that he, in fact, did flatly recommend drivers for hire (and apparently expected his recommendation to be acted upon favorably). Yet, at other times, it seemed that the tenor of his testimony, and the true understanding he had of his actions, was that he was merely responding to management's inquiries or putting in a good word for a friend, without any reasonable expectation that the words he spoke would be effectuated.

Sylva also testified that Kahihikolo recommended that John Castello be hired, and that the recommendation was effective. Kahihikolo denied Sylva's testimony, but all that has been said of Doversola could be repeated at this point.

Sylva testified that a former employee named Derek Lariosa was rehired upon the recommendation of Kahihikolo, who spoke glowingly of the improvements that Lariosa had made in his work habits and dependability. Kahihikolo admitted that he had counseled with Lariosa, so that he eventually developed into a good employee. Once more, extensive questioning developed little more than the fact that Sylva and Kahihikolo have major semantical differences, at best.

Summarizing, I must find that Respondent has not met its burden of proving by a preponderance of the credible evidence that Kahihikolo was possessed of or exercised the power to effectively recommend that employees be hired, rehired and/or promoted. Obviously, no such powers have been demonstrated with respect to dispatcher Wong. In my opinion, the best that can be said of Respondent's case with respect to Kahihikolo is that it is demonstrated that Kahihikolo did on a number of occasions, including with the four employees discussed above, either advise upper management officials of his favorable opinions regarding job applications of his own volition or upon their interrogation of him. That he did so with the expectation that his recommendation would be effective, rather than merely in a hopeful vein, has not been shown to my satisfaction.

The law is clear that the authority effectively to recommend generally means that the recommended action is taken with *no* independent investigation by superiors, not simply that the recommendation ultimately is followed. *ITT Lighting Fixtures*, 265 NLRB 1480 (1982).[12] Similarly, the fact that management seeks advice as to the potential of prospective employees from current members of its own employee complement is not itself thought to be sufficient to require a finding that those members of the current employee complement be held to be supervisors because of having given favorable recommendations. Cf. *The Mower Lumber Company*, 276 NLRB 766 (1985).

In deciding this question I must take into account the relative lack of fluency in English language which I observed in Kahihikolo. While I concluded that there were occasions during his testimony where he sought to parry or evade questions by hiding behind a cloud of professed or apparent misunderstanding, it is also true that I observed many genuine instances where he failed to compre-

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[12] Reversed on another issue. See *Cal-Western Transport*, 283 NLRB No. 66 (1987).

hend what was being asked him, and there were many more instances where his answers were, due I think to language difficulties, couched in terms which cannot fairly be used to attach a precise or legalistic meaning to any of the terms, such as "recommend," used by him.

So, there are two instances shown where the Respondent received recommendations from Kahihikolo, and yet had further follow-up of its own. There is one instance demonstrated where Kahihikolo's advice was sought out by the Respondent. And there is a final instance shown where Kahihikolo volunteered information in an effort to secure the rehiring of a friend of his.

All I can say about this is that I see no pattern wherein Kahihikolo has regularly or routinely exercised any authority which I would feel is sufficient to label him a supervisor based upon any of the alleged proofs that he has recommended hiring, rehiring or promotion.

I cannot close the subject, however, without adverting to my inability to resolve the issue in Respondent's favor on the basis of superior credibility of its witnesses. For while there were a number of troubling aspects to Kahihikolo's testimonial demeanor, and while I do not regard him as a thoroughly reliable witness, neither can I say that, at least with respect to the points at issue in this section of this decision, Sylva's testimony was markedly superior or that I could attach any greater credibility to it based upon her demeanor.

Thus, I conclude that the Respondent has failed in its obligation to carry the burden of proof on the issue of whether or not Kahihikolo and Wong have been demonstrated to be statutory supervisors by virtue of having possessed or exercised the authority to hire, rehire and/or promote.

ii. *Power to Discipline*

Respondent contends that both Wong and Kahihikolo had and possessed the authority to discipline other em-

ployees or to recommend that other employees be subjected to discipline. Again, however, Respondent makes no effort to demonstrate that Wong has ever actually used any of this purported authority. Responded instead relies upon its claim that the jobs are identical, and its proof that Kahihikolo has attempted to discipline or to recommend discipline for employees such as Derek Lariosa, Doug Peneku, Mark Borden, George Kahoohalahala, Bruce Stupplebeen, Patrick Choo, and Joseph Chai.

With respect to Larioca, Respondent put in evidence a documentation from Sylva showing that on July 19, 1986 Kahihikolo reported to Sylva that Lariosa was "playing games again", and that Kahihikolo thought it was about time that Lariosa was "talked to." Additionally, Kahihikolo, himself, admitted that he had sat down to talk with Lariosa and explained to him that he could help himself and his family more by showing up for work more regularly, and that if he wanted to make money he should learn the tours.

Thus, I accept as true Respondent's evidence that Kahihikolo did indeed counsel Lariosa and make a report to Sylva which ultimately proved to be a part of the record relied upon by Respondent in a decision to terminate Lariosa's employment.

Yet, I do not believe that this is sufficient to demonstrate supervisory power on the part of Kahihikolo. First of all, it does not serve Respondent's cause to demonstrate that Kahihikolo either counseled other employees or that he made reports which led to such counseling by management officals. One does not become a supervisor merely by passing on information, as distinguished from effective recommendations. Cf. *George C. Foss Co.*, 270 NLRB 232 (1984). And it seems to me that a fair reading of Sylva's testimony on this matter, as well as the documentation placed in evidence, leads to the conclusion that whatever action was taken against Lariosa by management in the nature of discipline was done only after

an independent investigation of its own by management, and was not based solely upon Kahihikolo's recommendation. Nor can the "counseling" by Kahihikolo, by itself be deemed sufficient to constitute the exercise of a supervisory power. Sylva admitted in her testimony that "counseling" was not tantamount to "discipline," and explained that counseling is considered by Respondent merely to be a "communication tool."

Employee Doug Peneku was issued a written warning by Sylva in November 1985. The warning was placed in his permanent personnel file record and explicitly states that it would be used as a predicate for further, more severe, discipline if the conduct referred to therein were repeated. Sylva testified, and Respondent introduced documentary evidence in an effort to corroborate, that this warning came at the recommendation and instance of Kahihikolo.

Kahihikolo initially denied making the recommendation attributed to him, but eventually admitted doing so under cross-examination. Additionally, he admitted that when he made his report to Sylva he had in mind the possibility that disciplinary action against Peneku could result.

Thus, I conclude that this was an example in which Respondent has successfully demonstrated the use of supervisory power to effectively recommend discipline by Kahihikolo.

Employee Mark Borden was counseled, and Sylva drew up documentation purporting to show that the basis for such counseling was Kahihikolo's recommendation. Kahihikolo testified that he had no recollection of having made any such recommendation.

As noted elsewhere, I have very serious reservations about the credibility of either Sylva or Kahihikolo. In this instance, I would credit the testimony of Kahihikolo over that of Sylva. It makes little sense to believe that Kahihikolo would have been complaining to Sylva, as is

indicated on the "documentation," to the effect that Borden was making "constant" requests for "early offs", in view of the fact that this incident allegedly occurred, if at all, on the first date on which Kahihikolo returned to work following a long absence of illness.

In any event, I find it unnecessary to resolve this question because, as noted earlier, the only result of the report, if the report was indeed made, was that Borden was the recipient of a "counseling," and Respondent cannot avoid the impact of Sylva's words conceding that counseling was not considered discipline. That being so, it serves Respondent not at all to demonstrate that any conduct on the part of Kahihikolo led to some reaction by Respondent's managers which is not considered to be discipline.

George Kahoohalahala was issued a written warning on June 30, 1986. Sylva testified that this came about as a result of a recommendation made by Kahihikolo, and her "documentation" was placed in evidence in an attempt to corroborate her testimony on the point. Kahihikolo admitted reporting the factual basis underlying the discipline, but denied that he made any recommendation.

I note that the documentation from Sylva states on its face that the matter would be investigated and that discipline would be issued to Kahoohalahala if that investigation warranted it. Thus, it appears clear that Kahihikolo's words were not sufficient to be an effective recommendation, no matter how they were phrased. Accordingly, I decide this matter contrary to the Respondent's position.

I cannot agree with the argument advanced by Respondent to the effect that Kahihikolo's recommendations were "effective," but merely had to be checked up upon because of a penchant he allegedly had for "playing favorites." It seems to me that, no matter what reason Respondent had to check out the reliability and accuracy of

any report passed on by Kahihikolo, about Kahoohalahala or anyone else, I need go no further than to ask and answer the question as to whether or not the recommendation was effective or was not effective, without regard to the reason therefor.

Though Sylva testified that employee Bruce Stupplebeen was the subject of a discharge recommendation due to numerous unexcused absences, her own documentation of the event shows that she engaged in a "follow-up" and that, as a result, she noted that Stupplebeen returned to work, that he had a doctor's slip, and that no disciplinary action was taken. (Respondent makes no argument with respect to Stupplebeen in its brief and I presume the matter has been abandoned by it, as I believe it should be, inasmuch as Sylva's own testimony demonstrates that even if a recommendation was made it was ineffectual.)

Sylva testified, and her documentation purportedly demonstrates, that employee Patrick Choo was the subject of a recommendation from Kahihikolo. Yet, as with other instances, her own documentation also demonstrates that Choo was not disciplined, and was, instead, merely "counseled." Further, that documentation demonstrates that there was a follow-up by Sylva, herself. Thus, not only is the question of how effective was any alleged recommendation made by Kahihikolo answered negatively from Respondent's standpoint, so is the question of whether any disciplinary action was taken at all.

Employee Joseph Chai was also allegedly the subject of a recommendation by Kahihikolo. Yet Sylva's testimony was that the recommendation was that he be counseled, and that, indeed, was what ultimately occurred. I have serious doubts about the credibility of Sylva while she was testifying about this matter and I am not inclined to place more than a minimal credence in what she had to say. Nonetheless it seems unnecessary to resolve the matter for, as previously noted no discipline resulted, but merely a "counseling."

Summarizing, on the issue of the dispatcher's power to discipline or to effectively recommend discipline, I have decided that the facts in six of the seven instances raised by Respondent do not support the Respondent's position. However, with respect to the facts surrounding the discipline given to Doug Peneku, I find and conclude that Respondent has met its burden of proof, and has demonstrated an instance in which Kahihikolo evidently possessed and exercised supervisory authority within the meaning of Section 2(11) of the Act. Accordingly, I conclude that Respondent's evidence on this issue, while having succeeded in demonstrating the exercise of supervisory authority by Kahihikolo on occasion, has failed to meet Respondent's overall burden of proving that Kahihikolo and/or Wong engaged in a pattern of conduct, as opposed to isolated and non-routine conduct, sufficient to cause them to be determined to be statutory supervisors.

(iii) Miscellaneous Indicia of Supervisory Authority

(a) Power to Incur Debt

As has been noted previously in this decision, there were occasions when the schedulers of work were unable to anticipate all of the needs to be realized on the following day. As a result, dispatchers were called upon and expected to respond to those needs as they arose. Respondent claims that such responses amounted to the exercise of independent judgment on the part of the dispatchers. Counsel for the General Counsel claims, not surprisingly, that such responses were no more than routine or clerical in nature, and based primarily upon instructions from higher management.

Respondent evidently concedes that dispatchers were not empowered to "farm out" business ot other transportation companies unless the need was imperative. As Wong testified, the practice of "farming out", amounted, in effect, to "giving away business". Yet, the totality of

the testimony from Kahihikolo and Wong led me to the conclusion that there were repetitive instances in which dispatchers were called upon, and did, conclude that Respondent was unable to meet certain demands placed on it by customers and, as a result, subcontracted with other transportation companies, or "farmed out," the work in question, in lieu of simply advising the client that Respondent was unable to perform the work. As always, the question was whether or not the dispatchers did so pursuant to instructions which rendered their jobs routine and clerical, or which allowed them discretion and independent judgment.

Respondent examined Kahihikolo with respect to a load which had been farmed out to another carrier on August 24, 1986. Kahihikolo's entry on the log for that day indicated that "nobody help poor old me". First, I was called upon to determine whether or not I should believe Kahihikolo's previous testimony to the effect that he had consulted with his chief dispatcher, Wesley Keahouhou, or had simply made a decision upon his own. Cross-examination on the subject might lead one to conclude that Kahihikolo had changed his testimony on this particular subject and, when confronted with a prior inconsistent statement, had determined that it would be improvident to stand by prior testimony.

In fact, that is the conclusion that I have reached. I am well aware of the testimony to the effect that 90% of the "farm outs" were handled by management, usually Keahouhou or Busche, in situations in which they instructed the dispatcher as to which company to use. The testimony of the dispatchers was, generally speaking, to the effect that "farm outs" were always done in consultation with, and at the direction of, higher management officials, and in the few instances, where no higher management official was present, generally around 10% of the occurrences, the dispatchers merely followed guidelines previously given to them by higher management. Thus,

the "farm outs" were done without independent judgment, and merely as the extension of management prerogatives exercised through intermediaries.

During cross-examination Kahihikolo was led through a series of incidents in which it would appear, on their face, that he had "farmed out" work to other companies based upon considerations originating in his own judgment. Kahihikolo denied this to be the case. Instead, so Kahihikolo testified, he telephoned Keahouhou or Busche when presented with the question of judgment. According to Kahihikolo it was one of these managers, not him, who made the decision concerning whether work should be farmed out and, if so, to whom.

Yet, extensive cross-examination and reference to documentary evidence upon this subject, eventually led Kahihikolo to admit that he made decisions whether or not to "farm out" work depending upon such factors as how much time he had, whether a driver and equipment were available, the proximity of available drivers, and "*my own discretion.*" (emphasis added).

Council for the General Counsel points out that such subcontracts were let to companies which were upon Respondent's list of approved subcontractors. Yet, Kahihikolo was forced to admit upon cross-examination that he occasionally made farm outs to companies not on his superior's "approved list", and that his decisions in this respect were based upon his personal relationships with the personnel of companies which he selected. Moreover, the general thrust of the evidence in this matter tends to lead me to believe that Kahihikolo actually determined to, and did regularly practice farming out work to a company not on the "approved" list based upon his personal considerations, despite the fact that such decisions by Kahihikolo resulted in a loss of money for Respondent, by virtue of the fact that other companies, not selected by Kahihikolo, offered a discount not offered by Kahihikolo's choice.

Thus, I have concluded that Respondent has shown that Kahihikolo had a practice of farming out work to other carriers of his own choice, whether or not his personal choice did or did not prove to be in the Respondent's ultimate best interest. Accordingly, I conclude that it has been demonstrated that this is a factor tending to demonstrate that Kahihikolo engaged in the practice of routinely exercising independent judgment committing Respondent's credit, as would be expected from one vested with the authority of a statutory supervisor.[13]

(b) Access to Confidential Information

According to Sylva Respondent installed a new computer system at its offices in June 1986. She testified that this was the primary change made in the dispatchers' job duties between the union's campaign and that which occurred in 1986. She would have it that the dispatchers, by their use of the computer system gained access to Respondent's personnel records, drivers' starting time, drivers' hours-worked-to-date, drivers' trip sheets, drivers' tips, drivers' sales, drivers' invoices, drivers' billings, drivers' tariffs, farm outs, airport movements, etcetera.

Wong claimed that his training upon the computer began only two months before his termination, that he was unable to operate the computer and required assistance from Keahouhou and Busche. Indeed Wong, Kahihikolo, and a relief driver, all denied having access to any confidential information or customer lists. According to them, in general, the dispatchers' duties upon the computer involved calling up and reviewing the various drivers' trip sheets.

I cannot regard this evidence as demonstrating that either Wong or Kahihikolo are confidential employees. Looking at the evidence in its most favorable light to Re-

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[13] I regard Respondent's evidence that dispatchers incurred debt in the form of towing expenses, or expenses for taxi cabs, as so sketchy as to be lacking in probative value.

spondent I cannot conclude that it demonstrates that either man assisted or acted in a confidential capacity to a person who formulates, determines, or effectuates management policies in the field of labor relations. That, of course, is the test. *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956). The rule is that unless it can be shown that the employee has played some role in creating the document or in making the substantive decision being recorded, or that the employee regularly had access to labor relations policy information before it became known to the union or employees concerned, the Board will not find the employee possessed of confidential status. *Associated Day-care Services of Metropolitan Boston*, 269 NLRB 178, 180-1 (1984).

Summarizing, I conclude that Respondent has not demonstrated by a preponderance of the credible evidence that either Kahihikolo or Wong had access to confidential information sufficient to demonstrate that either or both should properly be determined to have been a statutory supervisor.[14]

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[14] Respondent admits that its relief dispatchers are not to be deemed supervisors. Yet Respondent also admits that these same relief dispatchers had access to "confidential information", alleged to be indicative of supervisory status, identical to that of Kahihikolo and Wong. Yet, Respondent makes no claim that the relief dispatchers are supervisory employees.

I conclude that, true or not, Respondent's evidence demonstrates that a dispatcher, whether relief or regular, could conceivably have had access to information which might, if spread abroad, been embarrassing to Respondent. No such evidence has been presented. Of particular importance, there has been no evidence presented of any relationship between such conceivable knowledge and Respondent's conduct of its own labor relations. In my opinion that failure is fatal to Respondent's position, for the Board has held that only those who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations are determined to be outside the protection of the act. *B. F. Goodrich Co.*, 115 NLRB 722, 724 (1956). See also *NLRB v. Hendricks County Rural Electric Corp.*, 454 US 170 (1981). Viewing the evidence in the light most favorable to Re-

In view of what has been stated above I must conclude that Respondent has failed in its burden of proving that Kahihikolo or Wong is a supervisory employee by virtue of either's access to "confidential information".

(c) Special Access to Premises

Respondent points to the evidence that the dispatcher, having arrived earliest in the morning, was frequently called upon to open up Respondent's premises. Thus, Respondent's "day dispatcher" was routinely faced with the prospect of opening up Respondent's premises, and in order to do so Respondent's day dispatcher required the use of keys or combinations. While evidence was heard with respect to whether or not the gate(s) to Respondent's dispatch yard were or were not routinely locked, I do not regard this issue as a question of substance. Instead I believe that the evidence, read fairly, demonstrates conclusively that the "special access" granted to any "daytime dispatcher" resulted, not from any special status, but rather from the ability of such an individual to serve as a convenience to Respondent's managers.

Thus, I conclude that Respondent's evidence is insufficient to establish a pattern, as opposed to individual and isolated incidents, sufficient to establish that Respondent granted special access to its premises to either Kahihikolo or Wong sufficient to be indicative that one or either of them was a supervisor within the meaning of the act.

(ib) Power to Assign or Responsibly Direct Work

As previously noted, Respondent's regular procedure necessarily required that a number of assignments be left

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spondent I perceive no evidence that dispatchers formulated, determined or effectuated labor policies, or that they acted in the confidential capacity to anyone having such responsibility. Accordingly, it cannot be said that they are, or should be, excluded from the unit. *Intermountain Rural Electric Association*, 277 NLRB 1 (1985).

open when the schedulers did their tasks each afternoon or evening for the following day's work. Additionally, as also previously discussed, there were a number of sorts of emergencies which could arise during the course of the workday which required that changes in the schedule be effected. It is the contention of Respondent that such changes require the use of independent judgment by the dispatchers, that such changes were made regularly and often, and that Respondent's evidence demonstrates that it was not at all unusual for the dispatchers to effect such changes based solely upon their own judgment and without being in consultation with anyone from upper management.

Counsel for the General Counsel concedes that the dispatchers are shown by ample record evidence to have routinely effected changes in the duties of many other employees. However, she goes on to assert that Respondent's evidence demonstrates only that such duties are performed in routine fashion, do not require independent judgment, were made pursuant to direct supervision, instructions, and both written and verbal guidelines from upper management. Moreover, so counsel for the General Counsel asserts, one or more of Respondent's upper management were nearly always on duty, monitoring and supervising the dispatch office's operations. Counsel for the General Counsel, and her witnesses, would have it that in approximately 90% of the instances where such assignments or changes in assignments are made following the time that the schedule is drawn up that the assignment is made by someone in management as opposed to one of the dispatchers, and that during the remaining 10% of the time the dispatchers merely assign the run to the first driver who is available, using basically a common sense approach.

As it was with other issues regarding the supervisory question, Respondent's primary witness was Sylva. According to her both Kahihikolo and Wong regularly made

changes in the work assignments of other employees without consultation with upper management. Indeed, as exemplars, a number of instances of documentary evidence were introduced by Respondent. These purported to show changes made by both Kahihikolo and Wong during several days during the fall of 1986. According to Sylva most of these changes were done by the dispatcher without management intervention. For reasons unexplained in the record Respondent did not call Chief Dispatcher Keahouhou or Assistant Chief Dispatcher Busche to testify.[15] Relief dispatcher Kelly, who has worked at dispatching duties for at least 32 hours per week since late October 1986, admitted that in the great majority of instances where he was required to make changes in the schedules prepared the night before he was required to check with a manager, and that the instances where he doesn't do so involve "transfers" of short duration.[16] Helen Ho was more than willing to label Kahihikolo as the "head dispatcher", but, inconsistently, indicated that Kahihikolo and/or Wong had no authority independent of Keahouhou or Busche.[17] Michael Kubiak claimed to have knowledge that it was the evening dispatcher who made out the schedule, despite the obvious impossibility that he had such knowledge. The fact is that he was working out on the road when such duties were done. (Yet still went on

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[15] Since there was no showing that either was unavailable to testify, I infer therefrom that their testimony would have been adverse or unfavorable to Respondent's cause. *Martin Luther King Nursing Center*, 231 NLRB 15 Fn. 1 (1977).

[16] Kelly was an exceptionally incredible witness. His bias against the Union seemed palpable both from his testimonial demeanor, as well as by his willingness to embellish upon and magnify any fault of Counsel for the General Counsel's witnesses. Consequently, I've determined to accept any of his testimony only with the greatest of care and reluctance and only in those instances where it is not in dispute and has corroboration which seems credible.

[17] Ho's credibility is in extreme doubt due to her inconsistency and seeming confusion, as well as the virtually bristling bias against the Union which she exhibited in her demeanor.

to testify inconsistently that Sylva was in charge of overseeing that work.)[18]

Thus, summarizing the testimony on the matter it seems that Respondent would fail in carrying the burden of proof on this matter, for notwithstanding my strong misgivings about the credibility of both Kahihikolo and Wong, based, not only on their demeanor, but also upon their willingness to fabricate and modify their testimony as they went along and were caught in seeming inconsistencies throughout their cross-examination, neither did the testimony of any of Respondent's witnesses have the "ring of truth" about it.

However, it does appear to me that a resolution of this is possible. I reach that resolution by resort to the documentary evidence introduced by Respondent, and by recalling several admissions made by Kahihikolo and Wong.

I agree with Respondent's argument that Wong consciously attempted to portray himself in a minimalist light, as simply a night dispatcher who had no real input into the job duties of employees, and who was required, due to some unforeseen exigency, to effect a schedule change without consulting with upper management only about once a month on the average. However, that claim has been demonstrated to my satisfaction to be untrue.

Kelly testified (incredibly, as previously noted, but in this instance, backed up by Respondent's documentary evidence) that the night dispatcher regularly was left with roughly 20% to 30% of the day's total "runs" open for assignment. This would be true despite the fact that the day dispatcher would attempt to fill as many as those slots as possible during his time period on duty. And it

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[18] Once more, I largely discredit the testimony of this witness, not only because I felt that he was guilty of bias, but also because he demonstrated that he was confused and was quite willing to look past logical inconsistencies to testify to conclusions that he could not conceivably have knowledge about.

remains true despite the fact that one can accept as true the claim of both Kahihikolo and Wong that many, if not most, of the assignments which they made to these runs were indeed made in consultation with someone from upper management. And both dispatchers, during the course of their cross-examinations, have been shown to my satisfaction to have made such changes, of their own independent volition with substantially more frequency than either was willing to admit when questioned on direct examination about the subject.

This, in itself, would not be decisive. The mere fact that either made such schedule changes does not indicate one way or another the degree of independence exercised. Yet, when literally pinned to the mat by cross-examination, both Kahihikolo and Wong admitted to substantial independence of judgment.

For example, with respect to September 7, 1986, Wong was questioned about the fact that he had written in changes on *eight* open runs for that day, involving *five* employees. Under cross-examination on the question of whether or not he did so independently, he ultimately admitted that he couldn't recall that such changes were authorized by anyone in upper management, but that *it was his opinion that he did it himself.*

Similarly, Kahihikolo, claiming that his instances of assignments were limited to sporadic and infrequent instances when upper management officials were not present, and then were limited by upper management's general guidelines set forth in written or verbal instructions, was forced under cross-examination to admit that in a instances of times he made such assignments and that his criteria for doing so "*depended upon the circumstances, and on a number of factors,*" including his "*duty . . . to take care of the load the best we can*". As he phrased it,

he took it upon himself to do whatever was necessary to get the job done.[19]

I cannot forget the testimony of Kahihikolo admitting that in making the assignments he would be required to take into account his own knowledge of the proximity of the driver he was considering calling into Respondent's facility, that driver's experience with different sorts of equipment, the driver's ability to perform certain specialized functions such as conducting tours in either English or Japanese, and to generally monitor the situation so that Respondent's efforts to avoid seeming to "play favorites" were not thwarted. In my opinion these factors add up to a situation in which dispatchers were expected several times daily to exercise judgment of an independent nature in assigning work to drivers and other employees associated with tours.

Thus, in accepting this evidence, I feel compelled to conclude that Respondent has carried its burden of demonstrating that both Kahihikolo and Wong (and it would seem also true for any relief driver, such as Kelly, working as much as 32 hours per week in the job of dispatcher) to be statutory supervisors. Accordingly, I must, perforce, further conclude that both Kahihikolo and Wong are not employees, but, as supervisors, are not entitled to the Act's protections.

I make this conclusion, reluctantly, not only because of the injunctions set forth initially, but also because of my

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[19] As to the existence of any written guidelines, there was extensive inquiry during the course of the trial of a number of witnesses. I can only say that while a number of memoranda were ultimately produced and put into evidence, I have absolutely no hesitance in saying that there was no general criteria, in writing, for dispatchers to use in carrying out their jobs. This is not to say that dispatchers would not have access to records by which they might comply with general instructions of a routine nature, such as avoiding assignments to employees who had already worked substantial numbers of hours during the week and might, if given another assignment, incur additional costs for overtime wages.

"feeling" that it may simply be the incorrect conclusion, despite the fact that it is the conclusion to which the evidence has led me. I say this because of the fact that Respondent has, in my opinion quite obviously, played it somewhat "fast and loose" in its adoption of the position that Kahihikolo and Wong are statutory supervisors. My agreement with Respondent's position necessarily has a widespread and profound effect upon many other issues in this case, in effect, depriving many employees of representation rights to which, in my opinion, they might otherwise be well entitled.

I specifically refer to the position taken by Respondent during the course of the hearing on the petition for representation election filed by the Union in 1985. In the course of the hearing therein Sylva testified. Her testimony, and the position of the Respondent was that in the fall of 1985 the dispatchers were not supervisors. Respondent attempts to explain this by, disingenuously I think, claiming that she was only referring to Respondent's efforts to include yet another member of the family which owns Respondent, Yuki Kobayashi, in the bargaining unit. I reject that argument. I also reject Respondent's argument that, in the time intervening between the 1985 representation hearing and the 1986 filing of a petition, dispatchers' duties were substantially changed, most notably by the introduction of the computer system giving them access to confidential personnel and business information, and by efforts made to get the dispatchers to properly exercise more of their authority so that upper management would not constantly have to be present.

These are all matters which I find have been raised by Respondent but have not been adequately proven. To the contrary, Sylva admitted at one point during this trial that dispatchers' duties were not substantially changed from that which they had in 1985, (a time when she herself claimed that she felt such employees were supervisors,

notwithstanding her testimony at that time to the contrary).

Thus, summarizing, the Respondent's arguments and evidence in this respect seems somewhat malodorous and, as I have stated, were it not for the documentary evidence and admissions made by Wong and Kahihikolo, I would not have found them to be supervisors in this case.

Concluding, however, it is my finding and my conclusion that both Kahihikolo and Wong must be found to be statutory supervisors within the meaning of the Act, and to, therefore, be excluded from the protections afforded by the Act. Additionally, as will be commented upon at other points herein, Kahihikolo's participation in the solicitation and collection of authorization cards from fellow employees must, I think, be found to have had a substantial effect upon the rights of all his fellow employees.[20]

E. *Background of 1986 Organizational Campaign*

Following the failure the Union's organizational drive leading to its defeat in the election conducted in the fall of 1985, the Union's campaign appears to have lain dormant for a period of some months, notwithstanding certain testimony that organizational efforts "never really stopped."

However, during the months of late summer and early fall 1986 it appears from counsel for the General Coun-

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[20] I cannot end this section without mentioning that I regard Respondent's proof that several of the fellow employees of Kahihikolo and of Wong regarded either or both of them to be supervisory employees as being very unpersuasive. First of all, there is no indication that a majority, or even a substantial minority, so regarded Kahihikolo and Wong. Nor does it take into account the evidence presented by counsel for the General Counsel pointing to an opposite conclusion.

In this regard, I view the evidence as being insufficient to persuade me to adopt Respondent's position.

sel's evidence, that several employees began to complain to management about working conditions. For example, some of these drivers belonged to what was called a "Drivers Committee".[21]

The "Drivers Committee" met with management officials approximately once per month, generally at the call of Respondent's management. Ordinarily, Respondent was represented at these meetings by Gloria Sylva, Michael Kobayashi, Richard Mitsunaga, Wes Keahouhou and Bill Busche.

By the fall of 1986, however, Respondent came to view the attitude and morale of employees, including drivers, as being so low as to require management intervention. Thus, management caused a meeting of the Drivers Committee to be convened, and required that attendance be considered mandatory. This meeting was scheduled for September 9, 1986.

At this meeting, the parties discussed starting times, daily hours, weekend days off, assignment of runs, oil problems, mechanical condition of the equipment, load changes, sick leave, uniforms, school bus drivers, and the condition of the drivers' room. Among the complaints addressed by the drivers to management was that drivers were concerned that assignments were not made fairly, and that some were based upon favoritism. This eventually led to the drivers request that the Drivers Committee present such concerns to management, and their further request that a written response be posted thereto.

Within a day or two thereafter, management orally responded to the concerns which had been expressed in writing by employee Daniel Pihana, which summarized employee complaints and concerns raised at the September 9, 1986 meeting.

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[21] The committee had, in fact, been initiated by Respondent. It appears, however, that during its lifetime a number of employees came to regard it as a creature belonging to themselves, rather than to Respondent.

Thereafter, the representatives of drivers on the Drivers Committee met once again with management representatives on September 23, 1986. At that time they told Respondent's managers that the response to the questions raised at the meeting of September 9 were unacceptable. Respondent's management, however, made no further response and never posted a *written* response to the concerns raised in either of the earlier meetings.

On October 10, 1986 Respondent's management scheduled a meeting with the Driver Committee. However, instead of a regular meeting, a special meeting was conducted. That meeting didn't take place at Respondent's place of business. Instead, it was convened at the home of Hichiro Kobayashi, a member of the board of directors, the uncle of Michael Kobayashi, Respondent's president. Management officials present were Hichiro Kobayashi, Michael Kobayashi and Lawson Teshima. Drivers Committee representatives present were Daniel Pihana, Jerry Kaahanui, and Brian Okimoto. During the course of this meeting Respondent's representatives brought up and discussed with the employees the results of a "survey" which had been previously run by Respondent's labor relations consultant on employees' attitudes concerning management. Additionally they informed the employees that, during the previous year's organizational attempt by the Union, Respondent had been compelled to expend approximately $70,000 to "fight the Union". Drivers representatives were asked to restate the complaints of other drivers. They responded by saying that employees felt that Sylva was unfair, and that she showed favoritism among the various employees. A discussion ensued, which included alleged instances in which such favoritism was displayed.

At its conclusion, Hichiro Kobayashi instructed Michael Kobayashi to "make the move" to transfer Sylva out of the transportation division of Respondent's corporation and into another division. It is asserted, without re-

buttal, that he repeated this command to Michael Kobayashi a number of times during the course of the meeting. There is no claim by Respondent that during the course of this meeting that employees ever demanded that Sylva be transferred or terminated.

The employees were assured that the statements made by them and responses given to them would be kept confidential. However, the very next day employee Danny Pihana was called into Respondent's office. Once there, Sylva loudly complained to him about the statements made at Hichiro Kobayashi's house the night before, especially those concerning her. Obviously, Sylva had been informed about the specific grievances raised by drivers concerning her stewardship.

On October 15, 1986 William Kahihikolo was called into a meeting with Richard Mitsunaga, the operations-manager-in-training. Mitsunaga asked Kahihikolo how he felt about the Union and whether Kahihikolo knew how other employees felt about Mitsunaga. Mitsunaga solicited Kahihikolo's assistance in securing backing from the employee complement. Kahihikolo assented, but indicated that Mitsunaga would have to earn employee's respect. At that, Mitsunaga took from his files a letter indicating that Kahihikolo had been soliciting for the Union. (More about this issue will be raised and discussed at a later point herein.)

Kahihikolo denied solicitation, but equivocated as to what had been asked him by other employees.

On October 22, the Union filed a representation petition. That same morning, before the petition was filed, the Union's representative, Harold DeCosta, informed Respondent's management consultant, Benjamin Ventura, that the union would be filing that petition.

Sylva admitted that on October 22, 1986 she questioned employees Warren Ishii, Danilo Patlingrao, Eric Antonio, and Ronaldo Valera, each of whom was a member

of the washcrew. She testified that she asked them about their union activities.

On October 24 Kahihikolo and Wong were instructed to attend a meeting of management officials. They did so. While there Mitsunaga told Kahihikolo that he should consider this a counseling session, rather than a disciplinary meeting. They were handed a three page document dated October 23, 1986 addressed to "P.H.T. dispatchers" regarding a "letter of counseling no-solicitation/distribution policy and employees' duties of loyalty and confidentiality". According to this memoranda the dispatchers are required to abide by the no solicitation/distribution policy found in the employees' handbook. Following the discussion, Wong was excused from the room. Kahihikolo, however, was kept there, and Michael Kobayashi handed him a two page "notice of suspension". By its terms, Kahihikolo was suspended for a period of seven days, allegedly for violation of the no-solicitation/distribution rule, insubordination and sleeping on the job.

Thereafter Kahihikolo received a copy of the letter, took it to the Union's office, and the Union thereafter filed an unfair labor practice charge based thereon, dated October 27, 1986.

Employee Daniel Pihana credibly testified that Respondent's suspension of Kolo caused "hot discussion" among other employees on the issue as to whether or not Respondent was being unfair. According to Pihana some employees were of the opinion that it was unfair to suspend Kahihikolo because he had been soliciting, while the Respondent, so some employees claimed, took no action against another employee, Wayne Lackno, who had also, so the rumor went, been engaged in solicitation upon the company's premises and time. Pihana also called to mind the point made by some employees to the effect that employee James Nhomi had also been disciplined for engaging in solicitation, also receiving disparate treatment from that afforded Lackno. According to Pihana, the

perceived reason for the favoritism toward Lackno was that he was thought to enjoy a personal relationship with Sylva.[22]

On October 29, 1986 representatives of Respondent met with a representative of the Union at the board's offices. According to the credited testimony of the Union's representative, James Kellogg, he engaged in a discussion there with officials of Respondent, including Michael Kobayashi, Lawson Teshima, and Gloria Sylva, as well as the Respondent's attorney and its labor relations consultant. In the course of that discussion Kellogg stated to them that the Union was asking for recognition for an overall unit which would include the tour guides, the dispatchers and all of the remainder of the unit as set forth in the petition previously filed by the Union, and as had been found by the regional director to be appropriate in the representation case of 1985, mentioned above. Kellogg also told Respondent's labor relations consultant, Benjamin Ventura, that the Union had filed an unfair labor practice charge against Respondent because of its suspension of Kahihikolo. Kellogg made much the same remarks to Michael Kobayashi. When Respondent's attorney joined in the conversation and retorted to Kellogg that it was only an allegation and that nothing had been proven, Kellogg stated that the union was going to preserve the employees' rights in any legal way, including a strike.

The parties failing to reach agreement upon the appropriate unit, a hearing was scheduled in the representation case for November 5, 1986. As previously noted, however, it did not occur on that date, inasmuch as the Union withdrew its request to proceed.

Kahihikolo returned to work on November 3, 1986, the same day that Respondent issued a letter of counseling

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[22] Sylva admitted the personal relationship with Lackno, though, of course, denying any favoritism as a result thereof.

to driver Larry Fujihana, for his alleged violation of the no-solicitation/distribution rule. Sylva claimed that the letter to Fujihana was justified because Fujihana had "tongue lashed" employees in favor of signing union authorization cards at an airport holding area, known colloquially as the "O.K. Corral", where buses frequently wait for their assignments and where employees frequently gather in only one bus.

On November 7, 1986 Kahihikolo arranged a meeting with another of the Union's representatives, Harold DeCosta.[23] Kahihikolo testified, and was corroborated by both Wallace "Bozo" Shrinski, a driver, and DeCosta that DeCosta met with Kahihikolo, Shrinski, Doug Wong, and Derek Lariosa, a former employee, at the Union's offices that day. Among the matters discussed were allegations by employees that employees were being interrogated by Sylva concerning who had been signing union authorization cards and who had been working on behalf of the Union, alleged harassment of those engaged in union organization, the suspension of Kahihikolo, Respondent's position with respect to the inclusion or exclusion of employees in the proposed unit, and Shrinski's complaint with respect to the way employees' workdays were scheduled, including a specific complaint about his own situation. DeCosta responded to their complaints by noting that the Union had already filed an unfair labor practice charge on behalf of Kahihikolo, and by stating that the Union was giving consideration to setting up a recogni-

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[23] Employees were acquainted with several officials of the Union, both as a result of the campaign during 1985 and also as a result of the organizational activities in the fall of 1986. For example, as previously noted, Kellogg had worked upon the representation case negotiations and meetings. And DeCosta and Anna Othalt had conducted meetings with employees, at which authorization cards were distributed, the union's cause was explained and extolled, and union authorization cards were collected back. Additionally, it is presumed that many employees were familiar at least with the name and reputation of the Union's president, Art Rutledge.

tional picket line.[24] The meeting adjourned without any decision as to when or if particular further action would be taken.

However, the issue of whether or not employees would engage in activity to protest perceived injustice, or simply in support of one another, would not rest. On November 8, Kahihikolo was telephoned by Wong. Wong raised the issue of whether or not employees should have a "stop work meeting" on the following Monday, November 10. Kahihikolo, in turn, talked to employees Jerry Kaahanui, Pat Kahue, Joe Chai, Mark Borden and Wallace "Bozo" Shrinski.

At 4:00 in the morning of November 10, 1986 Kahihikolo telephoned DeCosta to tell him that the employees intended to have a "stop work meeting" that day. According to DeCosta, Kahihikolo told him that employees were

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[24] DeCosta credibly testified, and Ventura quite incredibly and preposterously denied, that both in the weeks preceding and in the days succeeding this meeting with employees DeCosta and Ventura had a series of conversations, both by phone and in person, during which they discussed the fact that the Union sought recognition, had filed a petition in furtherance of that desire, had filed an unfair labor practice charge against Respondent, and was prepared to take further actions on behalf of employees, including doing whatever was necessary to represent employees. Ventura's attempts to portray himself not as a representative of Respondent, but merely as an interested bystander struck me as so dishonestly stated as to be offensive. His attempts to disassociate himself with what were plainly negotiations between the Union and Respondent concerning issues which arose between the parties as the Union mounted its campaign in the fall of 1986, filed a petition, engaged in discussions concerning the inclusions and exclusions for the appropriate unit, and thereafter engaged in discussions with respect to the employees actions of November 10, 1986 and thereafter seem to me to be freely interspersed and interlaced with falsity. I do not credit Ventura's testimony in any instance other than an admission. His cavalier and arrogant demeanor caused me to conclude that falsehoods fall easily from his lips. Cf. *NLRB vs. Walton Manufacturing Company* 369 US 404, 408 (1962), quoting from *Dyer vs. MacDougall*, 201 Fed. 2nd, 265, 269 (2nd. Circuit 1952).

fed up, that they couldn't stand the harassment, the interrogations and that they wouldn't wait any longer for the Union to schedule a date. Kahihikolo asked DeCosta to come to a restaurant named Zippy's near Respondent's premises and speak to employees. He asked DeCosta to speak on behalf of the employees to Respondent. DeCosta credibly testified that he agreed to do so.

According to DeCosta's further testimony, which I credit, he met with a number of employees, including Kahihikolo, Wong, Shrinski, Borden and others at Zippy's around 6:30 that morning. They told him, in essence, that they were complaining of the same things as Kahihikolo had stated earlier to him on the phone. DeCosta recalled that resentment was expressed regarding the fact of Kahihikolo's suspension, and the way in which it had been done.

In order to understand Respondent's view one must return again to the meeting of October 9 between the Drivers Committee and management officials, including Kobayashi. Respondent's evidence, which I credit, was to the effect that it was explained to the Drivers Committee at that meeting that Respondent needed to remedy a poor financial condition by making an investment in luxury sedans, so as to better serve its customers. Going on, however, Respondent admits, as General Counsel contends, that Pihana insisted that the meeting be considered confidential and that, upon receiving assurance that it was, he and the other members of the Drivers Committee began to discuss grievances that employees had against Gloria Sylva. Respondent admits that these grievances centered around the scheduling of runs, and around charges that Sylva favored her boyfriend, Wayne Lackno, though Respondent makes no admission that such charges were well founded. Additionally, Respondent points to the fact that testimony was admitted to the effect that a driver named Jeremiah Kaahanui stated that "the men were having an awful time taking orders from a woman, es-

pecially receiving discipline from a woman, because they felt uncomfortable in giving any kind of answer back and using the words that they're used to." Thus, if I understand Respondent correctly, its employees were guilty of sexual discrimination against Supervisor Sylva by contending that they were not free to express themselves in the vulgar terms to which they were accustomed. In any event, so Respondent contends, Pihana went on to explain that the drivers wished to have Sylva moved out of her position as soon as possible, to which Lawson Teshima responded that Sylva was already slated to be moved out to Respondent's sales department in about three months. Pihana asked to see Respondent's position put down in writing. At the end of the meeting, so Respondent contends in complete agreement with counsel for the General Counsel, Hichiro Kobayashi stated his opinion that the move should be made as soon as possible. Thus, the meeting broke up, and evidently the understanding was that Pihana was to get this understanding set forth in writing. Equally evident, he did not.

Respondent concedes that it had planned to transfer Sylva to the sales department, and that that was the reason why Mitsunaga had been hired as the Operations Manager effective September 15, 1986. Nevertheless, so Respondent contends, Mitsunaga required further training in order to fulfill his responsibilities when he took over all of the functions as Operations Manager for Respondent. Thus, as we came to the fateful day of November 10, 1986 it was Sylva's opinion that Mitsunaga was not yet ready to take over her position.[25]

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[25] Respondent contends, in effect, that its actions should have placated employees. It points toward a memo posted on September 15, 1986 announcing Mitsunaga's promotion, and another of October 21, 1986, as well as Pihana's admission that he knew that Sylva was to be transferred eventually. It argues therefrom that the employees were unreasonable in thereafter protesting the actions of Sylva as well as demanding her ouster. Indeed it claims that employees acted unlawfully in demanding Sylva's transfer. Respondent

As I have previously discussed, communications were going back and forth over the previous weekend and the night preceding November 10 between various employees and the Union. They also were going on between members of Respondent's management team. Thus, Mitsunaga got wind of impending problems for the next day around 11:00 p.m. on November 9, 1986. Thereupon he called Sylva and arranged to meet her at the base yard, two hours later, at 1:00 a.m. on November 10. They met there, and in doing so checked the drivers roster to see who was scheduled to be on sick-leave, who had requested personal days off and who had not yet called in. Still bewildered as to what kind of problem to expect, and having found nothing out of the ordinary, they left and went home again.

F. *The Events of November 10, 1986*

According to Respondent Sylva determined that it would be best to stay in close contact with the situation. Thus, in order to do so she accompanied Mitsunaga when he opened up the Respondent's premises, as scheduled, at 5:30 a.m. on November 10, 1986. When they arrived there at that time they found that Respondent's two gates had been chained and locked. Neither of them remembered having done so. Habitually the gates were left with the locks situated so as to appear locked, despite the fact that they were not. They attempted to unlock the gates with their keys, without success. They then asked an employee to lend them his bolt cutters, only to learn that he did not have them with him. As a result, Sylva and Mitsunaga climbed the fence and went into the base-yard. There they called the fire department of the City

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states flatly in its brief that, in its opinion, the walk-out of November 10, 1986 was engaged in by a number of its drivers in an attempt to force Sylva's immediate ouster, and, in further argument, Respondent contends that the employees' efforts were violative of Section 8(b)(1)(b) of the Act.

of Honolulu to come and cut the chains, and the fire department responded at approximately 6:30 a.m.

Meanwhile, Sylva had telephoned Michael Kobayashi. She learned that Kobayashi was on his way to the "big island", the island of Hawaii, with Lawson Teshima. She then called the airlines to page either man. At approximately 6:15, when Mr. Kobayashi arrived at the airport he called Sylva and was apprised of the situation.

Thus, we come to the beginning of the work day with Respondent claiming that it had no idea that a labor dispute was about to take place, and that it believed that the rumors it had heard earlier referred only to the fact that someone intended to, as they had, lock the gates.[26]

DeCosta credibly testified that sometime after 6:30 a.m. on November 10, 1986 he spoke to Ventura, Respondent's management consultant. According to DeCosta he told Ventura that employees were upset or angry over Kahihikolo's suspension, and feared that they might be subjected to the same sort of discipline. I credit DeCosta's testimony in this respect and his further testimony that he and Ventura went on to discuss Sylva's alleged interrogation of employees and her favoritism of Lackno.

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[26] Obviously, to me this is too big a bite to swallow. In the previous year Respondent had carried out an extensive and costly campaign in response to the Union's efforts to organize its employees. Upon the Union failing in the election of 1985, and a year's time having elapsed, the Union was once again embarking upon a campaign and obviously involved in efforts to gain majority support. I do not believe Ventura's claims that he never passed on such viewpoints to Respondent's management; such claims are preposterous. And considering the fact that by November 10 Respondent had knowledge of a pending R case petition, a pending C case charge, and a demand for recognition by the union, I can only say that, even while considering the Respondent's views of this evidence in its most favorable light, Respondent was either remarkably naive or has recited its views in an extremely disingenuous fashion. I believe the latter is true.

Finally, I credit DeCosta in his testimony that he requested recognition on behalf of the Union.

For its part Respondent acknowledges that between around 6:30 and 9:30 on the morning of November 10 Sylva went outside Respondent's building and attempted to learn employees' intentions. In order to do so she read statements to employees and inquired of them whether they intended to come to work. Sylva testified that when she first went out there were many employees gathered outside. A number of these employees were merely milling around and seemed confused as to what they intended to do or why they were standing around.

She stated that she went out to the group and asked a number of employees several questions. Initially she testified that she asked various employees, in turn, whether they intended to come to work that day. She acknowledged that she then went on to state to them that if they did not report to work they would be disciplined, up to and including discharge.

Later, she once again went out to the yard and asked employees whether they were coming to work that day, saying that, if the employees refused, she had no choice but to hire someone to replace the employees who refused to come to work.[27]

Sitll later, Sylva approached the men in the yard a third time. By her own account, this time she told the men that Respondent had an open door policy. She told them that they could meet with Michael Kobayashi at any time pursuant to that open door policy. She went on to tell employees that she was ordering them to return to work and, in turn, asked each of them whether

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[27] By this time, so Sylva testified, she had been told that some of the Respondent's drivers had advised Respondent that they had been threatened while out on the road proceeding with their work. There is no evidence about the details of such threats and there is no evidence as to the identity of the persons making such threats.

or not they intended to come to work. She went on to state to each of them that, if they did not, she had no alternative but to "terminate your employment" effective immediately. She closed by stating that, "If you do not report to work I will proceed to replace you with people willing to work."

Sylva testified that she later made a fourth foray into the Respondent's yard. This time she told the employees milling there that she was warning them that if they did not show up for work on the following day they would be "terminated" and Respondent would find a permanent replacement for them.

Some employees arrived for work that day, determined to enter the yard and proceed about their business, and did so. Many others, according to the general sense of the evidence, showed up, saw that there was some sort of a dispute occurring, decided to find out the basis of the dispute before proceeding into work, and ultimately determined not to go to work. I can only conclude, as a result, that such employees, obviously several dozen in number, had determined to make, at least for the time being, common cause with those employees who had some sort of labor dispute, whether well founded or not, with Respondent.

According to Respondent Sylva received negative responses to Sylva's first entreaty from employees Tanaka, Shrinski, George Kahoohalahala, Kaahauni, Pihana and Canosa and Gomes.

Further, Respondent admits that Sylva received negative responses to her entreaties to return to work on her second visit to the yard from employees Vieira, Adams, Choo, George Kahoohalahala, Canosa, Chai, Tanaka, Glidden, Kahue, Nhomi, Mito, Borden, Tengan, Kanehailua, and Pihana. As Respondent put it, many of the men, upon being approached by Sylva, turned their backs upon her and walked away when she tried to read them the

statement that she wished to make. Sylva claimed that she became intimidated by the employees' "ice cold" reaction to her. Thus, despite having worked with these men for a year and a half to two years, she felt afraid. This fear was heightened when police officers who had come to the scene approached and asked her if her car was there outside the gates, and upon being apprised that it was, told her that she had better move it because "they're talking about damaging it."[28] According to Sylva, when she attempted to draw one of the employees into a conversation as to why he was out there and refusing to work, the employee simply turned his back and refused to say anything.

It is admitted that Sylva approached Jeremiah Kaahanui and Daniel Pihana since they were members of the Drivers Committee. So she asked them what was going on. Kaahanui responded "Babe, I don't know what's going on, but I can't work until I do." Pihana responded, so Sylva testified, "I don't know." Additionally, so Sylva testified, Driver Chai told her, "I don't know what's going on, but I'm not going to work until I do."

At this early time in the morning there was no formal "picket line" established. There were no signs showing that the Union was promoting, sponsoring or supporting employees in this demonstration. Instead, as I view it, there were simply several dozen employees refusing to cross into Respondent's facility despite being threatened with such things as "replacement", "termination", or "discharge".

As stated in Respondent's brief, "Because no one seemed to know why the men were refusing to work or why [they] did not want to talk to Ms. Sylva, she had no

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[28] The identity of anyone speaking about damaging her car, if one assumes that such a statement was indeed made, was never revealed to the record.

idea what was going on and only knew that the men were refusing to work." (Grammatical sense added.)

By late that same morning, however, Respondent concedes that, not only was the Union on the scene in person, but it had also supplied employees with picket signs which identified a labor dispute between the Union and Respondent. Nonetheless, Respondent insists that it had no idea that a labor dispute between it and the Union existed. Instead, so Respondent asserts, the Union had an obligation to inform Respondent of its intentions to strike and that, failing that, employees failed in a similar obligation. Finally, Respondent asserts that the employees' silence concerning the subject matter of Kahihikolo's suspension, interrogation of employees, or the number of authorization cards in the Union's possession belies any claim of any legitimate purpose behind the employees refusal to come to work on November 10 or thereafter, or in their further actions in carrying picket signs in support of the Union thereafter. It is undenied that members of Respondent's former complement of employees carried picket signs identifying a labor dispute between Respondent and the Union from midday November 10, 1986 forward. Nonetheless, so Respondent claims, such a labor dispute is deprived of its protected nature by virtue of the fact that a number of employees engaged in unprotected activities.

According to Respondent in testimony which I credit, there were occasions during which employees of Respondent carried picket signs in front of Respondent's baseyard entry and exit. These picket signs identified a dispute between Respondent and the Union. Additionally, as had occurred earlier in the day, throughout November 10, 1986 unidentified members of the group of employees and/or bystanders who gathered on the morning and afternoon of November 10, and thereafter, shouted to Sylva, and other members of Respondent's management team, any number of demands, some of which were un-

doubtedly personally offensive. For example, Respondent has presented evidence, which I accept as credible, that certain unidentified employees yelled, at various times during the morning on November 10, or thereafter, words to the effect that, "Hidey, hidey, ho, the bitch has to go!", referring to Sylva. Other evidence was presented to indicate that when various members of the board of directors or other high management officials were present some of the employees present would yell words indicating that they desired Sylva to be replaced, discharged, or otherwise placed in a position where she could not have any effect upon the employees.

Generally speaking, I accept Respondent's evidence. I think that the evidence is quite persuasive that employees did, in fact, engage in the conduct ascribed to them by Respondent. Thus, I conclude that unidentified employees called for the replacement of Sylva in a rude, even discourteous or obscene fashion.

Michael Kobayashi returned to the Respondent's premises the following morning, November 11, 1986. He went out to the picket line and attempted to talk to employees, to no avail, since the men would not talk or even look at him. On the evening of November 11, Kobayashi called Pihana trying to find out why no one would talk to him. Pihana told him that all other employees told him that they were not to talk to Mike Kobayashi. Kobayashi offered to Pihana to meet with employees at a restaurant the following morning. Pihana agreed to let other employees know of Kobayashi's intentions.

Kobayashi also telephoned an employee named Okimoto on the night of November 11, telling him to inform fellow employees that he would be at the meeting at the restaurant at "Violet's" the next morning.

On November 12, Kobayashi went to the base-yard. There he got what he referred to as the "cold shoulder" from all employees involved. When he went up and down

the picket line, he noticed that employees were chanting "Don't talk to Mike, don't talk to Mike, don't talk to Mike." Nevertheless, Kobayashi went to Violet's restaurant around 8:00 a.m., as he had said he would. Upon arrival at Violet's, Kobayashi noticed no employees present therein. Since it was raining, he took up a station across the road therefrom. Within minutes, he noticed that Kahihikolo drove up, parked, and watched from a parking spot nearby Zippy's, located near Violet's. Kahihikolo, instead of attempting to meet with Kobayashi, just sat in his car for approximately from 45 minutes to an hour. Following that, Kobayashi left, returning to the base-yard around 10:00 a.m.

When he arrived he saw that there was a team from a local television station present to secure a news story. He noticed that employees were picketing and chanting, "Hidey, hidey, ho, the bitch has got to go!". He states that after the television team arrived the picketers changed their chant to, "Hidey, hidey, ho, you know she has to go!".[29]

On November 12, 1986 Michael Kobayashi recalled that DeCosta told him, on the picket line that, "Mike, we're going to call this the Gloria strike." According to Kobayashi, DeCosta thereafter attempted to restrain and coerce another employee named James Taba from driving a bus out of the base-yard.

On November 13 or 14, 1986 Ventura reported to Michael Kobayashi about the results of a meeting he'd

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[29] I accept this description of the events by Michael Kobayashi as generally true. Michael Kobayashi was reasonably credible when it came to ordinary descriptions of events not in dispute. He seemed very well spoken and modulated in his responses to questions which were designed, obviously, not to provoke him. However he attempted to remain silent on sensitive points, and quibbled, equivocated, or engaged in long hesitations followed either by *sotto voce*, hesitant answers, or by booming and breezy answers. Thus, my impression was that Michael Kobayashi was not entirely credible.

had with Art Rutledge and DeCosta on November 12, 1986. As Ventura would have it, he acted solely in a private capacity, not in any official capacity as a representative of Respondent. According to Ventura, Rutledge told Ventura that the only way to end the strike was to remove Sylva, reinstate the employees, and recognize the Union. Ventura, while emphasizing that he never ever spoke for Respondent, told Rutledge that Respondent refused to recognize the Union, and that Respondent would only agree to an election. Indeed, despite such discussions, and despite the presence of DeCosta and other union officials on the picket line, and despite picket signs carried by employees proclaiming the Union to be on strike, Respondent maintains that it was uncertain as to whether or not the Union had any real role in the "strike". According to Ventura's incredible testimony, the Union's and Respondent's officials went back and forth for several days as to whether or not the strike was "sanctioned" or not. In fact, so Respondent maintains, the only thing that was clear to Respondent was that its employees were remaining outside its premises and demanding that Sylva be removed as Operations Manager. Additionally, Respondent maintains that its employees chanted and made offensive and vulgar statements to and about Sylva every time they saw her.[30]

Respondent avers, and I accept as true, that the period thereafter proved to be very stressful for Sylva, to the extent that the combination of long hours of work and emotional stress resulted in her bottom lip being covered with fever blisters. Thus, on November 20, 1986 Michael

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[30] Indeed, I accept as true that certain unidentified individuals made statements of an offensive, vulgar, and even obscene nature to and about Sylva. Whether or not such individuals who made these statements were employees of Respondent is unknown to me. I suspect that they were. I don't have any proof that they were. I notice, however, that Respondent has seized upon the possibility that they were to excuse its readiness to blind itself to facts which would be obvious to a reasonable person.

Kobayashi decided that it was in Sylva's best interests to remove her from Respondent's management team. He affected this change and placed Sylva in the sales department of Respondent's Waikiki office. Notwithstanding, picketers thereafter allegedly stated that she was not gone far enough, and that she should be out completely.

In the days that followed those employees who refused to come to work continued, generally, in their refusal to speak to Sylva, Teshima, or Michael Kobayashi. Instead, they continued to press a demand, asserted on the first day of the "stop work meeting" that Respondent's board of directors meet with them.

On November 17, 1986 Respondent sent letters to 38 of the persons named by Sylva to the persons assembled outside the Respondent's base-yard on November 10. While the documents were not identical, the general thrust of each is to notify the affected individual of the termination of employment status with Respondent. One other employee, Alfonso Bocoboc, was sent a similar letter on November 19. The final letter was sent to Alex Antonio on December 4, 1986.[31]

The Supervisory Status of Washcrew-Co-Chief Willy Kekuewa and Washcrew Co-Chief Ricardo Fajardo

Respondent employs a crew of workers who routinely work through the night to clean the vehicles and prepare them for use on the following day. The vehicles are then stored on the base-yard in a way which evidently requires some expertise, inasmuch as they simply will not fit unless parked exactly correctly and in the proper order. During

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[31] As previously shown, I have determined that William Kahihikolo and Douglas Wong must be considered supervisors; accordingly, I shall disregard the letters sent to them. Additionally, counsel for the General Counsel moved at trial to amend the complaint by deleting the name of Ricardo Fajardo; that motion was granted, and I shall disregard this letter as well. The remaining 37 names are set forth in Appendix C.

all times relevant hereto one shift of such employees has been headed by Ricardo Fajardo, who bears the title of Co-Chief Washcrew, while the other shift has been headed by Willy Kekuewa, who has an identical title. While it appears that the two shifts of employees substantially overlap in working hours, it also appears that there are numerous occasions when only one of the two co-chiefs is present, due to the fact that their shifts are not entirely overlapping and that each fills in for the other on the other's days off.

Unlike its position with respect to the dispatchers, Respondent has consistently maintained that the wash crew co-chiefs are supervisory and should be excluded from the unit. The regional director's decision in 1985 so found and concluded.[32] Counsel for the General Counsel concedes that the seven washcrew employees, together with Kekuewa and/or Fajardo spend their eight hour shift performing manual labor, cleaning, gassing, and parking buses. While the washcrew itself cleans the inside and outside of the vehicles, based upon a list which they receive from the dispatcher, Kekuewa and/or Fajardo appear to be rovers, engaged in observing the work of the washcrew, and parking the buses so that they are correctly "spotted" for their intended use during the following day. Their observation of the washcrew evidently is done with an eye toward making sure that the washcrew continues working, rather than simply goofing around or sleeping.

Kekuewa seemed to imply that the crew knew their jobs so well that they really needed no supervision, only an occasional reminder from him to go back to work when

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[32] I agree with counsel for the General Counsel's assertion that a finding in a representation case that a person is a supervisor has no binding force in a subsequent complaint case. *Rock Hill Telephone Company*, 234 NLRB 690, 691, Fn. 4 (1978). Nevertheless it has some value in any recital of the history of the position in question.

he observed them goofing off or not working properly. And, all agree that Kekuewa's methods of communication with the washcrew are somewhat less verbal than one might expect. Indeed, it appears that all concede that Kekuewa generally communicated with the wash crew by banging on the bus to draw the attention to the workers and then pointing toward the job that he thought the workers should be doing.

Kekuewa conceded that following the issuance of the decision and direction of election of the Regional Director in 1985 Sylva met with him and told him that he was a supervisor and that, as such, he was considered part of management and would be subject to discipline if he used his position as a manager to encourage the Union. Kekuewa also conceded that he once reported an incident where an employee refused to follow his directions to Sylva, with the result that Sylva interviewed and instructed the employee that he was required to listen to Kekuewa, since Kekuewa was his supervisor.

Based upon this evidence I conclude that Kekuewa and Fajardo are, and in all material times herein have been, statutory supervisors within the meaning of section 211 of the Act.

Accordingly, like Kahihikolo and Wong, they were not entitled to the protections of the Act and their authorization cards cannot be counted toward demonstrating majority status on the part of the Union.

G. *The Alleged Violations of Section 8(a)(1)*

(1) Sylva's interrogation of Ishii, Patlingrao, Antonio and Valera on October 22, 1986.

The complaint, as amended, alleges that Sylva unlawfully interrogated washcrew employees Ishii, Patlingrao, Antonio and Valera about their union activities on October 22, 1986.

The facts are, as partially set forth previously, that Sylva claims that she did question these employees on that date, but that she did so only in furtherance of an investigation she was conducting concerning the activities of Kahihikolo. She explained that this investigation was sparked by a complaint which was initiated by washcrew employee Ishii. Thereafter, having first secured legal advice, she went and started talking to members of the washcrew. She first spoke to employee Patlingrao, telling him that Respondent had received an employee complaint about being forced to sign the card for the Union. She then went on and explained her understanding of the law to the employee before asking him, "Were you forced to sign a card?" Sylva recalled that he responded by denying that he had been forced, but that he did state that when he went into the dispatch office Kahihikolo would stop him and talk about the benefits of belonging to a Union. Sylva then asked Patlingrao whether this had occurred during working time. And received an affirmative response. She then asked for and received a written account of Kahihikolo's activities from Patlingrao.

Sylva went on to say that she next spoke Ronaldo Valera. At this time she was accompanied by Mitsunaga. She asked Valera exactly the same questions that she asked Patlingrao and advised him that she had received a complaint from an employee who felt he had been forced to sign a union authorization card. Once more she repeated her understanding of the law, and then asked Valera to tell her whether or not he had been forced to sign a card. Valera responded negatively and she left.

She then talked to Eric Antonio, giving him pretty much the same information she'd given the other employees, and asking him the same question, and once more receiving a negative response.

In conclude from all this that Sylva did violate Section 8(a)(1) of the Act in each of the three instances where she interrogated employees about whether or not

the employee had been forced to sign a union authorization card. Employers are not privileged to ask employees questions which, if answered truthfully, compel employees to reveal their sentiments concerning unionization. The question posed by Sylva could have had no other impact upon employees. Nor was it necessary, for despite my findings that Kahihikolo was a supervisor and, as a result, subject to discipline for failing to hew to the company line, Sylva already had information volunteered to her by Ishii sufficient to suit her purposes. And even assuming she needed further information regarding the alleged union activities of a supervisor, I would find that she failed to give adequate assurances against the possibility of retaliation, or explanations of the need for such information to employees before interrogating them.

(2) Sylva's interrogation of Valente on October 31, 1986.

The complaint, as amended, alleges that Sylva unlawfully interrogated employees on or about October 31, 1986 concerning their union activities and sympathies.

The evidence of this, entirely from Sylva's lips, was that during the course of a job performance evaluation with Valente she, Sylva, told Valente that it had been reported that several employees felt that they had been forced to sign union authorization cards during an incident which had occurred earlier that month aboard a bus at the O.K. Corral. Sylva went on to tell Valente that, according to her information, Valente was among those employees forced to sign a union authorization card.

Sylva denied interrogating Valente, and indicated that it was her belief that she could merely make such a statement to Valente and not be concerned that Valente would find her statement tantamount to a question. I believe that there is no other reasonable interpretation of Sylva's words. It seems to me that when one's boss, during the course of an evaluation, comments to the effect

that one has been associated by rumor with a cause which the boss had openly opposed, one would be expected to respond, and admit, deny or explain the truth or falsity of the reports made to one's boss. Thus, I conclude that Sylva's words were tantamount to a question, and, as such, constituted unlawful interrogation because of their tendency to compel an employee to reveal the employee's attitude and sympathies towards unionism.

(3) It is alleged that Sylva interrogated employee Larry Fujihana during the course of a counseling session on November 3, 1986.

General Counsel's evidence in this regard once again comes from the words of Sylva. In this instance, however, they were written into a memo which Sylva made concerning the meeting she conducted concerning the meeting she conducted with Fujihana. And while a review of that memorandum does not indicated forthrightly that Sylva asked Fujihana about his union sympathies or activities, it does clearly support the inference, which I make, that while directing the employee's attention to Respondent's no-solicitation/no-distribution rule, and having received a denial by the employee of any wrongdoing she provoked the matter further by instructing the employee to put it in writing if it was a lie. Not surprisingly, Fujihana attempted to evade, saying that he didn't remember. At this, Sylva "refreshed his memory". This led to Fujihana then going on recall an occasion when Ana Othalt, the Union's representative, came to the O.K. Corral after being sent there by Kahihikolo.

In sum, I regard this as another example of the technique used in the next preceding subsection. Sylva, in a situation necessarily provoking some sense of tension within an employee, that is, a counseling session, made a statement indicative of management knowledge of some conduct on the part of the employee known to be contrary to management's interest. Being met by a denial by the employee, Sylva persisted and invited the employee to

write down his version if her information was a lie. In turn this led to the employee revealing more and more concerning his past activities on behalf of the Union and his sentiments toward the Union. I find such conduct coercive, and violative of Section 8(a)(1) of the Act.

(4) It is alleged that Michael Kobayashi, by telephone on the evening of November 10, and at the Respondent's facility on November 11, 1986 interrogated employees about their union or protected concerted activities and coerced employees by attempting to induce them to abandon their statutory right to engage in union or protected concerted activities.

Kobayashi admittedly called employee Pihana during the evening of November 10. He started out the conversation by asking what was going on and then told Pihana to come back to work. Kobayashi recalled that Pihana responded that the employees were declining to come to work because of Sylva, that they wanted her "out". Kobayashi then recalled that he went on to say to Pihana that he should come back to work and they would talk about it. Pihana responded that he couldn't do that. Kobayashi went on then to ask Pihana to do him a favor, and get everyone to come and see him or try to get everyone to talk to him at the base-yard at 6:00 the following morning.

Kobayashi also telephoned employee Bryan Okimoto that evening. Okimoto, in response to Kobayashi's inquiry about what was going on, stated that the employees were behaving stupidly, but that when he came by and saw what was going on that morning he left. Kobayashi stated that Okimoto told him that the employees were refusing to work because of Sylva.

The next day Kobayashi went to the base-yard and attempted to talk to numerous employees who were refusing to work. However, as he put it, everyone ignored him, and simply looked at the ground and continued walking; they did so all day long.

I will decide this matter in connection with the following subparagraph.

(5) It is alleged that on or about various dates in November 1986 Lawson Teshima interrogated employees at Respondent's facility concerning their union or protected concerted activities and coerced employees by attempting to induce them to abandon their right to engage in union or protected concerted activities.

Like Michael Kobayashi, Teshima was away from the premises during the day of November 10, but received word of some of what was going on there. Upon his return that evening he went to the base-yard. While he was there he admittedly approached employees and asked questions. For example, he asked employee Bernard Adams why the men were not back at work. Wallace "Bozo" Shrinski was told by Teshima that Michael Kobayashi wished to talk to the employees individually at a nearby restaurant name Violet's.

While Respondent attempts to portray these questions as merely those of innocent businessmen attempting to find out what lay behind puzzling behavior by employees, I find myself unable to accept this argument. Of course, it must be granted that Respondent had no expectation that November 10 would witness such a labor disruption. Yet, the very fact of its occurrence, preceded, as previously demonstrated, by weeks of activities such as the filing of a representation case petition, the filing of an unfair labor practice charge, the conduct of meetings by management to discuss employees gripes and concerns, and the issuance of a disciplinary suspension to one whom I have found to be a statutory supervisor, as well as a warning of possible discharge (though it was denominated as a counseling) to another employee, could lead only an extraordinary stupid employer to so totally discount the possibility that employees might be acting in concert. Clearly Michael Kobayashi is not stupid. Nor do I accept that either be, Ventura or even Sylva were

still at sea concerning the bare possibility that employees might be engaging in union and/or protected concerted activities by, at the very latest, late in the morning of November 10. For it is conceded by Respondent that at that time picket signs appeared asserting that the employees were engaging in a strike, and that they were doing so in connection with the Union. Thus, notwithstanding Ventura's efforts to avoid learning the obvious, I conclude that officials of Respondent had very little reason to doubt that its employees were engaged in union activities by the evening of November 10.

Thus, the attempts to contact such employees directly by phone, or by approaching them upon the picket line inquiring as to their purpose in being on a picket line and inviting them to come back to work and talk things over are seen by me as attempts to avoid the possibility of having to deal with the Union.

Certainly at that point Respondent was under no obligation to recognize the Union. But neither was it free to pry away the Union's supporters one-by-one by approaching them directly, either in person or by phone, and inviting them back to work to talk things over.

In reaching this conclusion, it must borne in mind that all employees on the picket line had been advised repeatedly earlier in the day that they were "subject to discharge", that they were "discharged", and that they were "terminated". Thus, the odor of coercion in the air was not subtle. Instead, summarizing its bluntness, employees, approached by Michael Kobayashi or Lawson Teshima on an individual basis, and invited to return to work, might escape the consequences of the pronouncements made by Sylva earlier that day. I believe that any reasonable employee would have been subjected to a strongly coercive invitation to abandon legal activities, i.e., withholding services as an employee in concert with other employees in order to protest working conditions,

or to make common cause with employees who were making such a protest, or in order to demonstrate support for the Union. Accordingly, I find that both Michael Kobayashi and Lawson Teshima violated Section 8(a)(1) of the Act by approaching employees and, under the guise of merely finding out what was going on, interrogating them in a way well calculated to draw out employees as to their Union sentiments, and to induce them coercively to abandon their support for the Union or their activities in concert with other employees.

I cannot agree with Respondent's argument that in contacting members of the Drivers Committee, or in speaking to employees on the picket line, it was merely conveying an implicit unconditional offer of reinstatement. Nor can I agree that no one from management ever told employees they could not come back to their same jobs, seniority, or rate of pay. As previously noted, and renoted, large numbers of employees had been told on the morning of November 10 that they were subject to permanent replacement, that they were discharged, that they were terminated, any of which might well give employees the exact opposite idea from that which Respondent now contends it was seeking to convey. And all of which would clearly distinguish this case from the cases cited by Respondent in an attempt to demonstrate that valid offers of unconditional reinstatement were made in an atmosphere free of coercion. Not only do I *not* find the atmosphere to have been free of coercion, neither can I find that there were any unconditional offers of reinstatement. Instead, employees were invited to return to work and talk it over. No assurances were offered. No remedies were provided for the unfair labor practices previously noted, and no disclaimers were entered by Respondent. By all that appears to me, employees would simply have been compelled to give up their lawful right to engage in Union and/or protected concerted activities, return to work, and take their chances.

H. The Alleged Violations of Section 8(a)(3)

1. William Kahihikolo: As I has previously found, I feel compelled by the evidence to conclude that Kahihikolo was a statutory supervisor. Thus, he is not entitled to the protections of the Act, and Respondent is entitled to rely upon his loyalty and adherence to its stated policies. Here, as previously noted, Respondent had a stated policy of spending substantial sums of money to prevent a union from gaining representation rights for its employees. For while management officials were prone to point out to the individual employees from time to time that employees were free to do as they wished, it is also clear that employees were told that management was opposed to the Union, and that it had spent $70,000 to prevent the Union's gaining the right to represent the employees during the previous year. Respondent's actions bespoke, in numerous ways, its animus toward the Union. In my opinion it would have required a particularly insensitive employee to have that conclusion escape him.

When Kahihikolo engaged in the activity of solicitation on behalf of the Union, and of going further and distributing authorization cards and collecting them on behalf of the Union, he clearly, if unknowingly, opened himself up to lawful discipline by his employer. Thus, while it does appear that he was subjected to disparate treatment in the application of the no-solicitation/no-distribution rule, and that had he been an employee rather than a supervisor, that a different result would follow, nevertheless I must conclude that the disciplinary action handed out to Kahihikolo was privileged by virtue of his supervisory status.

(2) Sylva's interrogation of Fujihana has been previously discussed and found to have been violative of Section 8(a)(1) of the Act.

Additionally, counsel for the General Counsel alleges that it coincided with the issuance of a letter of warning

to Fujihana stemming from Respondent's disparate and discriminatory of a no-solicitation/no-distribution rule, in violation of Section 8(a)(3) of the Act.[33]

Respondent's rule concerning solicitation or distribution read as follows:

> No solicitation or distribution of any kind by employees will be permitted during work time or in work areas. "Work time" for the purposes of this provision means time spent in performance of an employee's job duties and does not include meal periods. "Work areas" for the purposes of this provision means areas where job duties are performed and does not include such places as restrooms or hallways. Non-employees solicitation or distribution at any time anywhere on company property.
>
> This rule applies to every kind of solicitation or distribution, including fund-raising efforts for schools, societies, lodges, political candidates, and labor organizations. Violations of this rule should be immediately reported to the department head or to the employee's supervisor.
>
> The sole exception to this rule is for the annual Aloha United Way campaign.

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[33] While it is true that the letter issued to Fujihana was labeled as a "counseling", it is equally true that the body of the letter draws to a conclusion that Fujihana had engaged in the misconduct of violating Respondent's no-solicitation/no-distribution rule, and that, because thereof, he was being issued a formal written warning that subjected him, upon any future violation, to immediate discharge. In my opinion this can only be viewed as a disciplinary activity on the part of Respondent, as opposed to mere counseling. As counsel for the General Counsel points out, the effect of such a letter was to bypass Respondent's own rules for progressive discipline, and to immediately make Fujihana subject to a stronger penalty for any future infraction. Since that penalty was expressly stated to include possible discharge I cannot agree with Respondent's position that no discipline was involved.

Counsel for the General Counsel does not maintain that the rule is facially invalid.[34] Indeed, so she maintains, it was disparately applied against both Fujihana and Kahihikolo. Because of my finding that Kahihikolo was subject to Respondent's discipline by virtue of his supervisory status I must enter the further finding and order that allegations pertaining to discipline of Kahihikolo stemming from any alleged disparate application of the rule should be dismissed.

However, an opposite result follows for Fujihana, an admitted employee. There is no question that Fujihana was disciplined because he boarded a bus waiting at the O.K. Corral for further assignment. On that bus were other drivers and employees of Respondent, similarly awaiting assignments. Sylva admitted that there were no conditions set up what employees on that bus could talk about while they awaited further instruction, or to go to work. Instead, one driver monitored the radio which would have been used to communicate with all of them had each person remained in his own bus. Yet, because Fujihana had boarded the bus and therein talked to other employees about the merits of signing a union authorization card, he was subjected to discipline. Adding insult to injury, Fujihana's admitted further "wrongdoing" in distributing betting slips, a violation of another the Respondent's rules was evidently condoned, for it was nowhere set forth as a reason for the warning issued to him. Instead, Sylva acknowledged that Fujihana was issued the letter of counseling, which I have found to be a warning, only because of his attempts to "tongue lash" other employees into signing union cards at the time he boarded the bus at the O.K. Corral.[35]

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[34] See *Our Way, Inc.*, 268 NLRB 394 (1983).

[35] Sylva lamely sought to distinguish the two types of conduct, and claimed that Fujihana was not disciplined because of the betting slips, by virtue of the fact that she had never seen them. Yet, I must ask, what further proof did she need? Fujihana admitted to her that he had been distributing betting slips for football games.

Thus, I have no doubt in concluding that Fujihana's letter of warning was issued based upon a disparate application of the rule.[36] Thus, I shall require that Respondent cease and desist from enforcing its no-solicitation/no-distribution rule in a disparate or discriminatory fashion, remove the letter of warning from Fujihana's personnel files, and assure him that it will not be used against him in the future.

3. The mass discharge of November 10.

The facts pertaining to this portion of my conclusions are set forth in detail elsewhere. As I have found, there is ample evidence in this record to sustain a conclusion, which I make, that employees were engaged in union and/or protected concerted activities when they engaged in a "stop work" meeting on the morning of November 10, 1986. And while I know of no requirement, as Respondent suggests there is, that employees give notice of their intention to engage in protected, concerted or union activities, I must say that it is quite evident, based upon a review of the events leading up to November 10, that employees were acting in concert to protest working conditions, and also to demonstrate support for the Union. As noted earlier, there were a series of meetings between representatives of the Union and Respondent having to do with questions surrounding the Union's effort to organize Respondent's employees. An unfair labor practice charge had been filed by the Union on behalf of an individual

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[36] My finding of disparate application is based upon what other types of conversation were permitted within the buses as they awaited assignments at the O.K. Corral. It is not based upon the various and sundry instances of commercial activity at Respondent's premises, all of which had to do with the attempts to demonstrate that Kahihikolo was subjected to illlegal discipline by virtue of disparate application of the rule. In light of the fact that I have been compelled to dismiss those portions of the complaint having to do with Kahihikolo by virtue of his supervisory status I have made no findings with respect to whether or not the rule was enforced disparately in connection with those commercial activities.

whose supervisor status was subsequently placed into question, which, in an exceedingly close call, I have found in favor of Respondent. Employees had conveyed to various management officials and members of the Board of Directors their displeasure with certain of Respondent's personnel practices, so much so that a member of the Board of Directors, an elder member of Michael Kobayashi's family, had instructed him to make some changes in the management structure of Respondent. Employees were called in and warned about engaging in disruption or solicitation, and other employees were questioned about their activities and sympathies.

As a result, I do not find it difficult to believe that employees became impatient and took matters into their own hands on November 10. That the Union was itself taken aback, and surprised, seems to me to be of no moment. The actions of employees were equally protected with or without the Union. The employees were acting in concert to protest, and seek redress of, complaints about certain of their wages, hours and working conditions.

True enough, it appears that many of the employees had little or no prior knowledge of the "stop work" meeting. Nevertheless, when they chose to join fellow employees and make common cause with them they placed themselves within the protective cover of concerted activities. And if the Union was caught off guard, and even if one accepts (which I do not) the alleged evidence that it disavowed sanctioning of the employees" stop work" meeting, the Union's position quickly changed. For it was only about five hours after the "stop work" meeting began that the Union showed up and distributed picket signs identifying itself with the "stop work" meeting, or strike, and helped with its organization.

While I can appreciate Respondent's desire to avoid somehow inadvertently granting recognition to the Union I cannot go further, and agree with Respondent's position that the activities of employees were not protected

from their outset on November 10. Thus, it seems to me so obvious as to need no discussion that when Sylva told employees that if they refused to return to work they were terminated Respondent violated Section 8(a)(3) as to all employees affected. My conclusion remains the same whether the employee was merely within hearing range, or had her remarks addressed to him/her face to face, or who heard of her remarks and still chose to engage in protected, concerted, or union activities. I conclude that all 36 employees who received letters of termination several days later were discharged illegally, on account of their having engaged in union and/or protected concerted activities, all in violation of Section 8(a)(3) of the Act. The names of these employees are as set forth in Appendix C hereto. This list, of course, conforms with the allegation of the complaint, aside from the deletion of three persons found to be supervisors, and one person (also a supervisor) whose name was amended out during the course of the trial.

I reject Respondent's argument that its letters sent on and after November 17 notifying employees of their termination, should be found to have converted an unfair labor practice strike into an economic strike, and to have constituted offers of unconstitutional reinstatement, resulting in the tolling of the backpay obligation. I simply read the letters with far different eyes than Respondent's counsel. No matter how I read the letters I find no offers of reinstatement set forth therein, and it strains credulity to believe that the argument is seriously advanced that these letters were sent out in an effort to provide employees with reassurance that Respondent intended to honor all applicable laws. To the contrary, in my opinion the letters had the natural and intended effect of reinforcing and ratifying the illegal discharges carried out by Sylva on November 10.

I. The Alleged Violation of Section 8(a)(5) of the Act.

As previously set forth herein the parties have stipulated to the appropriate bargaining unit (See Section III, B). Additionally, I have found that a demand for recognition was made by the Union in a proper fashion by the Union's Agent, Kellogg, at the Board's offices, while meeting there with Respondent's officials at the pre-hearing conference for the representation case. I have found that DeCosta repeated this demand to Ventura on November 10. Thus, given the massive and serious unfair labor practices previously found, it would normally appear that a case such as this would warrant the imposition of a bargaining order, since the severity and breadth of the unfair labor practices make, in my opinion the holding of a fair election exceptionally difficult, if not impossible.

However, the result does not follow in this case, because a bargaining order cannot be imposed absent a showing that the labor organization involved once represented an uncoerced majority of the employees in the affected unit at the time that an appropriate demand for recognition was made.

And that is plainly impossible here. As previously noted, in the demonstration of any such majority, authorization cards are commonly used. However, they may not be used where they have been obtained for the union by coercive means. In this case, many of the Union's cards were obtained in just this fashion, even if unwittingly. For while it is a very close question, I have found that Kahihikolo was a statutory supervisor at the time he solicited and obtained many of the authorization cards. As set forth in the cases cited above, cards obtained by a supervisor are generally said to be "tainted". Taking into account the overall background against which Kahihikolo solicited cards, including several instances where it was later claimed, whether credibly or not, that employees feared supervisory retaliation by Kahihikolo if they failed to sign the cards I cannot say with any assurance that

this is one of those cases where there has been sufficient demonstration that the supervisory participation in the solicitation and obtaining of authorization cards by the union was so minimal, and demonstrably so non-coercive, as to warrant such cards as the supervisory participation relates to being counted in determining whether the Union ever reached majority status. Cf. *Medical Investors Association* 216 NLRB 941. Thus, I conclude that the rule applies that under no circumstances will the board issue a non-majority bargaining order. *Gourmet Foods*, 270 NLRB 578 (1984).

The parties stipulated that the appropriate unit included 94 employees as of October 29, and 93 as of November 10, both of which are dates upon which I have found that the Union demanded recognition from Respondent. (Notwithstanding Ventura's incredible denials of the testimony of union agents Kellogg and DeCosta.) In an attempt to demonstrate an authorization card majority on either of these dates counsel for the General Counsel placed 58 authorization cards in evidence. However, it is clear that not all of these cards can be counted. Three of them, signed by employees Kepoo, Lariosa and Ryusaki, were apparently validly obtained, but the employees had left their employment with Respondent by October 29. Three others were not signed until long after October 29 or November 10, i.e., those cards belonging to Danny Pihana (signed on Christmas Day 1986), Danilo Patlingrao (signed on December 29, 1986), and William Kekuwa's card has been shown to be ineffectual in demonstrating majority status because of its timeliness, his card, together with the two cards of Kahihikolo and Wong, must be excluded because of their supervisory status.

Thus, as I revise counsel for the General Counsel's arithmetic I conclude that, viewing the evidence in the light most favorable to counsel for the General Counsel's position, the unit consisted of 91 employees as of October

29 and 90 employees as of November 10. Then, after removing the eight cards mentioned above, counsel of the General Counsel is left, at best, with a prima facie showing of the authenticity of 50 cards in a unit of either 91 or 90 employees. Therefore, order to demonstrate a majority on either date, she would be required to show the validity of 46 of the 50 remaining cards in evidence.[36] This she cannot do. For apart from the nine cards attacked by Respondent, mentioned below, which were the subject of evidence from various witnesses, only the cards of employees Pihana, Shrinski, Fujihana, Peneku, Nhome and Vieira have been shown to be valid by the testimony of the employees who purportedly placed their signatures thereon. All of the remaining cards were authenticated by the testimony Anna Othalt, a Union representative, or Kahihikolo.[37] Each testified that they had solicited the

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[36] Respondent raised various questions about the cards of employees Kale Au, Kubiak, Canosa, Pedro Valera, Ronaldo Valera, Fujihana, Ho, Valente, and Kelly. However, I am convinced upon a review of the evidence as a whole that in each case signatures were placed on these cards with adequate knowledge of the consequences of doing so, and not as the result of either coercion or misrepresentation. Kubiak's testimony on the point was shifting and inconsistent to the point of being incredible. Ho's testimony seeking to recant or attack the validity of her own card, as well as that of Valente and Au, not only fails to show that she or the other employees were unaware of what they were signing and its consequences, but also seemed to be the product of bias against the Union. Kelly's testimony concerning his own card was obviously the product of bias and the self interest he had in securing an advanced position with the Respondent. Fujihana's testimony, itself, answered any questions about the validity of his card, while the testimony of Ronaldo Valera eventually convinced me that, while his understanding, and that of his father, of the meaning of the card may have been less than ideal, it was at least adequate to conclude that both understood the consequences in signing it. Thus, I would reject the challenges to each of these nine cards by Respondent.

[37] Normally this method demonstrating a card's authenticity would be sufficient. See *Reeves Bros., Inc.*, 277 NLRB 1568, note 1 (1986).

cards from employees and received them back from the affected employee, or had received the card under circumstances indicating that it was valid. Of this number 17 were obtained by Kahihikolo. Out of that 17 only one, that of Kali Au was subsequently authenticated in my opinion, by the testimony of Ho. There are 16 which, in my opinion cannot be counted, due to the taint of supervisory participation in their solicitation and collection.[38]

Thus counsel for the General Counsel is left with a showing of only 34 valid cards, 12 short of the required number to demonstrate majority status for the Union.

Accordingly, I conclude and find that Respondent has not been demonstrated to have violated Section 8(a)(5) of the Act, and that no entry of a bargaining order is warranted. Accordingly, I shall dismiss these portions of the complaint.

J. The Strike was an Unfair Labor Practice Strike

Since I have determined that among the reasons that employees initiated the "stop work" protest on November 10, 1986 was their perception that an unfair labor practice had been committed against one who has been ultimately determined to have been a supervisor, but also to protest certain activities by management officials which were regarded by employees as harassment, (such as the interrogation detailed above and the disparate application of the no-solicitation/no-distribution rule as it pertained to employee Fujihana) I would be inclined to find that this strike amounted to an unfair labor practice strike at its outset.

However, if there were any doubt about the matter it was resolved by Respondent's own actions. By 10:00 on the morning of November 10, 1986 all of the employees

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[38] These are the cards of employees Doversola, Miyasaka, Tengan, Yeung, Choo, Crowell, Glidden, Ishii, Kanehailua, Nishiyama, Kahue, Tamaru, McShane, Agasid, Tamaru and Kaahanui.

who failed to abandon their protest had been illegally discharged in violation of Section 8(a)(3). In light of this clear nexus between the strike or "stop work" meeting, as well as the quick hardening of positions of the parties into a protracted labor dispute in which the Union played an obvious part, I have no alternative but to label this as an unfair labor practice strike.

As previously noted I have found that it was not converted back by virtue of any "curing effect" in Respondent's letter sent out to the affected employees on or about November 17, 1986. As stated above, I find no offers of unconditional reinstatement set forth in those letters, and cannot strain hard enough to so construe them. Accordingly, I determine that the employees are, and have been, engaged in an unfair labor practice strike, and are entitled to the rights accruing therefrom, including the right to an unconditional offer of reinstatement from Respondent. *Abilities and Goodwill Inc.*, 241 NLRB 27 (1979).

K. The Misconduct Issues

(1) At the trial Respondent presented evidence in an attempt to demonstrate misconduct on the part of the strikers away from the picket line of sufficient severity to warrant the withholding of a bargaining order, and to serve as a predicate for the denial of reinstatement rights of affected employees engaging in strike misconduct. In general, this evidence consisted of a number of incidents of violence directed toward Respondent's equipment, with the possibility that it could also entail danger to Respondent's employees who choose not to engage in the strike or to Respondent's passengers.

Such conduct obviously occurred, according to the undisputed testimony of Michael Kobayashi, in approximately a dozen instances. However, there is no instance in which any of the perpetrators of the conduct could be identified. While I have my suspicions that certain of the strikers may well have been involved in at least a portion

of this conduct, that suspicion is no substitute for proof. And I find no proof anywhere in the record connecting any striker, any agent of a striker, or any representative of the Union with such conduct away from the picket line. Accordingly, and especially in view of the fact that no bargaining order has been entered in any event, I reject this evidence offered by Respondent.

(2) Additionally, Respondent offered a good deal of evidence at the trial concerning alleged misconduct of its striking employees and representatives of the Union at the picket line. While there was an isolated incident of threats to do harm to property, including automobiles, of management officials, either the damage was unproven or the identity of the person doing it was unproven. Accordingly, I must reject this proof as well.

The remainder of the proof came in an attempt by Respondent not only to demonstrate that employees had forfeited rights of reinstatement by virtue of misconduct, but also in an attempt to demonstrate that the "stop work" meeting and the ensuing picketing did not amount to a protected strike. In this connection Respondent presented video tape, and tesitmony concerning various incidents on the picket line. In general, these incidents all concerned what Respondent terms to be conduct violative of Section 8(b)(1)(b) of the Act, that is, an attempt by employees to secure the removal of Sylva, a collective bargaining representative of Respondent.

I accept the evidence of Respondent as demonstrating that the employees on the picket line were not always polite. I agree with Respondent's position that certain of the employees, though by no means all, or even a majority of them, on the picket line sometimes engaged in shouting at management officials and employees who entered Respondent's premises and, in Sylva's case, there was repeated rude and vulgar references to her as a "bitch".

Having done so, I reject Respondent's position that this evidence demonstrates that specific strikers either lost or forfeited their rights to reinstatement because of proven misconduct, or that such activity changed the nature of the employees' protests into activity which was unprotected.

I see no proof that there was any charge filed alleging the violation of Section 8(b)(1)(b) on the part of the Union. Absent, that, I know of no provision in the law holding that an employee, as opposed to a Union, may violate Section 8(b)(1)(b) of the Act. Nor has Respondent pointed out any such case in its argument or brief.

From all that appears, Sylva was a source of much concern among employees. Whether this was due to sexist attitudes, as Respondent claims, or due to her alleged favoritism and unfair labor practice activities, as the Union and counsel for the General Counsel claim, seems to me to be of only tangential importance. What is important, in my opinion, is that there is no instance where Respondent has introduced proof tending to demonstrate that employees sought to have Sylva removed as Respondent's collective bargaining representative.

To the contrary, during the course of meetings and discussions between employees and management officials beginning in early October, employees stated their grievances against Sylva. At that date no one even referred to her removal as the collective bargaining representative of Respondent, and it was Respondent which, itself, interjected the concept that she would be transferred to another corporation owned by Respondent. Weeks later, with several intervening unfair labor practices having been committed by Sylva, employees were on a picket line and had been discharged by Sylva. Thus, while, as I have stated, one must concede that employees' conduct was somewhat rude and vulgar, it seems scarcely surprising to me that some of them became angry at her, referred to her as a "bitch", and that some of them yelled that

she should be fired, (which is not, in my opinion, the same thing as demanding her removal as collective bargaining representative).

I view the actions of the employees in this case as being valid protests of a supervisor's illegal actions against them. Such protests, and even protests of the discharge of a supervisor, have been held to be lawful and protected. *Fibracan Corp.*, 259 NLRB 161 (1981) and cases cited therein.

While one can sympathize with Sylva because of the rudeness and vulgarity demonstrated toward her, I cannot reach the conclusion that such activity, or any other misconduct demonstrated in this case by Respondent ever reached the level that it would, in my opinion, even come close to removing an employee from the protections of the Act. For, I do not see any conduct, and have had none called to my attention, which went beyond the use of epithets, vulgar words, profanity, vulgar gestures and the like.

I am mindful that the Board has restated the appropriate standard for determining the reinstatement rights of employees in strike-related misconduct. *Clearpine Moldings*, 268 NLRB 1044 (1984). But, even under the standard announced there, I do not believe that it can be reasonably concluded that the misconduct here ever rose to a level where it could be said to have reasonably tended to either coerce or intimidate other employees, management officials, or non-employees. While Sylva was undoubtedly upset over the events that were occurring, I can not lay all of that suffering which she experienced at the door of the alleged misconduct on the part of striking employees. It seems reasonable to me to suppose that the occurrence of the dispute, by itself, would have accounted for a considerable portion of the stress she experienced. Additionally, she had doubtlessly been notified of management's decision to transfer her; it seems rea-

sonable to believe that a portion of her emotional distress might have been caused by a sense of humiliation or resentment.

Summarizing, I conclude that Respondent's evidence of misconduct, whether at or away from the picket line has either not been demonstrated to have been carried out by any employees or any agent of the Union, or, in instances where carried out by employees (though for the most part still unidentified employees) to have risen to the level where it could be said to have reasonably tended to interfere with and coerce those against whom it was directed, notably Sylva. Accordingly, I find that Respondent has failed to demonstrate that employees have forfeited their right to reinstatement, that the Union is not entitled to representation rights if it can demonstrate majority support, or that the activities engaged in by employees at the picket line from and after November 10, 1986 lost their protected nature.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees; by threatening to discharge employees; by inducing employees to abandon a strike; by disciplining an employee for having engaged in union or concerted, protected activity which it deemed violative of its rule against solicitation/distribution; and by discharging employees, Respondent has interfered with, restrained and coerced employees in violation of Section 8(a)(1) and (3) of the Act.

4. The strike engaged in by the employees commencing on November 10, 1986 was caused and/or prolonged by

Respondent's unlawful conduct, and thus was an unfair labor practice strike as of November 10, 1986.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section (2), (6) and (7) of the act.

6. The Respondent did not violate in any manner other than as specified above.[39]

Order [40]

The Respondent, P.H.T., Inc., D.B.A. Polynesian Hospitality Tours, its officers, agents, successors and assigns shall:

1. Cease and desist from:

a. Interrogating employees; threatening to discharge employees; inducing employees to abandon a strike; disciplining employees for engaging in protected concerted or union activities; or discharging employees because said employees have engaged in union or other protected concerted activities.

b. In any other manner interfering with restraining or coercing employees in the exercise of their rights under Section (1) of the Act.[41]

---

[39] All outstanding motions not ruled upon in the body of this decision are hereby overruled, with the exception of the respective motions to correct the transcript entered by each party. As to the motions to correct the transcript I grant each party's motion.

[40] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[41] I provide for a broad order herein in view of the variety and severity of the unfair labor practices committed by the Respondent, which in my opinion demonstrate a disregard for the statutory protections afforded employees by that Act. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Offer immediate and unconditional reinstatement to their former positions of employment to those employees discharged on November 10, 1986, and make them whole for any loss of earnings suffered by reason of the unlawful discrimination against them. The employees affected are:

Bernard Adams
Gregoria Ancheta
Alex Antonio
Eric Antonio
Santiago Antonio
Alfonso Bocoboc
Mark Borden
John Castello
Joseph Chai
Patrick Choo
Harold Crowell
Juan Fangon
Nicholas Foster
Ernest Glidden
Paul Gomes
Santiago Grande
Jeremiah Kaahanui
George Kahoohalahala
Patrick Kahue
John Kanehailua
William Kekuewa
James Kusumoto
Gerald Mito
Albert Moepono
James Nhomi
Mitsuo Nishiyama
Bryan Okimoto
Danilo Patlingrao
Douglas Peneku
Daniel Pihana
Wallace Shrinski
Bruce Stupplebeen
Hideo Tanaka
Mutsuharu Tengan
Pedro Valera
Ronaldo Valera
Robert Vieira

If any such employees remain on strike following the offer of reinstatement, referred to above, Respondent shall place the names of such persons upon a preferential hiring list and offer them reinstatement as positions become available under the rules generally prescribed for defining the rights of economic strikers.

b. Post at its Honolulu, Hawaii facility copies of the attached Notice marked "Appendix A".[42] Copies of the notice on forms provided by the Regional Director, after being duly signed by Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced, or covered by any other material.

d. Notify the Regional Director for Region 20 in writing within 20 days from the date of this decision what steps have been taken to comply herewith.

Dated: 27 October 1988

/s/ Frederick C. Herzog
FREDERICK C. HERZOG
Administrative Law Judge

---

[42] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

NOTICE TO EMPLOYERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

AFTER A HEARING IN WHICH ALL SIDES HAD THE OPPORTUNITY TO GIVE EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AND HAS ORDERED US TO POST THIS NOTICE, TO ASSURE YOU OF YOUR RIGHTS UNDER THE LAW, AND TO ADVISE YOU OF THE ACTIONS WE ARE REQUIRED TO TAKE TO REMEDY OUR VIOLATIONS OF THE ACT.

The Act gives employees these rights:

To engage in self-organization;
To form, join, or assist any union;
To bargain collectively through representatives of their own choice;
To engage in activities for the purpose of mutual aid or protection or collective bargaining;
To refrain from the exercise of any or all such activities.

WE WILL NOT do anything which interferes with these rights. More specifically we will not discourage membership in, or activities on behalf of Hawaii Teamsters and Allied Workers Number 996, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization, by discharging or threatening to discharge employees or otherwise discriminating against them in their hire or tenure of employment.

WE WILL NOT interrogate employees about their own, or other employees, union activities, leanings, or sympathies.

WE WILL NOT ATTEMPT to induce employees to abandon a strike.

WE WILL NOT discriminatorily enforce a rule against discussing the Union during working hours or work situations, and you are hereby notified that we rescind the action we took against Larry Fujihana for having done so, and have removed all references to such incident from our files and have provided Larry Fujihana with written assurances that we have done so and that this incident will not be held against him in the future in any way.

We will offer:

Bernard Adams	Patrick Kahue
Gregoria Ancheta	John Kanehailua
Alex Antonio	William Kekuewa
Eric Antonio	James Kusumoto
Santiago Antonio	Gerald Mito
Alfonso Bocoboc	Albert Moepono
Mark Borden	James Nhomi
John Castello	Mitsuo Nishiyama
Joseph Chai	Bryan Okimoto
Patrick Choo	Danilo Patlingrao
Harold Crowell	Douglas Peneku
Juan Fangon	Daniel Pihana
Nicholas Foster	Wallace Shrinski
Ernest Glidden	Bruce Stupplebeen
Paul Gomes	Hideo Tanaka
Santiago Grande	Mutsuharu Tengan
Jeremiah Kaahanui	Pedro Valera
George Kahoohalahala	Ronaldo Valera
Patrick Kahue	Robert Vieira

immediate, full and unconditional reinstatement to their former positions of employment, without prejudice to their senority or other rights and privileges previously

enjoyed, and, should any such employee(s) still be participating in a strike against us, we will, at such time as said employee(s) choose(s) to discontinue striking, immediately reinstate him/her or them, as previously set forth.

WE WILL remove any references to the discharges of the employees named above from his or her personnel files, or any records maintained by us, and we will not use his or her discharge or layoff as a basis for any future personnel action against him or her, and WE WILL provide employees with written assurance that we have done so and that WE WILL NOT hold such actions against them in the future.

WE WILL make all the employees named above whole for any loss of pay he or she may have suffered as a result of our discrimination against him or her, together with interest.

WE WILL not in any other manner interfere with, restrain, or coerce any of our employees in the exercise of the right to self-organization, to join or assist Hawaii Teamsters and Allied Workers Number 996, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization, or to bargain collectively through representatives of their own choice, or to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any all such activities except to the extent permitted by Section 8(a)(3) of the Act.

P.H.T., INC. D.B.A.
POLYNESIAN HOSPITALITY TOURS

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

APPENDIX B

Name	Classification	Wage Rates Per
Adams, Bernard	Driver	$8.75
Agasid, Frederick aka "Fred"	"Casual" Driver	$7.50
Amosa, Amosa, Jr.	Driver	$5.50
Ancheta, Gregorio	Maintenance Man	$3.80
Ano, Junko	Guide	Piece-Rate
Antonio, Alex	Maintenance	$6.20
Antonio, Eric	Washperson	$3.50
Antonio, Santiago	Washperson	$4.15
Asato, Kay	Guide	Piece-Rate
Au, Kasey aka "Kale"	Driver	$5.50
Bocoboc, Alfonso	Washperson	$3.80
Borden, Mark	Driver	$9.20
Butt, Philip	Coordinator	$4.50
Canosa, Jose	Driver	$8.75
Castello, John	Driver	$7.50
Chai, Joseph K., II	Driver	$8.75
Choo, Patrick	Driver	$8.75
Collins, Elizabeth	Coordinator	$5.45
Crowell, Harold	Maintenance	$5.85
Danko, Dina	"Casual" Driver	Piece-Rate
Dias, Manuel aka "Maney"	"Casual" Driver	$5.50
Doversola, Rodney	Driver	$7.50
Fangon, Juan	Maintenance	$9.95
Foster, Nicholas, Jr.	"Casual" Driver	$8.75
Fujihana, Laurence	Driver	$8.75
Fursuawa, Minoru	"Casual" Driver	$5.50
Glidden, Ernest H., Jr.	Driver	$5.50
Gomes, Paul	Maintenance	$9.55
Grande, Santiago	Washperson	$3.80
Henry, Edward	Coordinator (PCC)	$927/month
Hepa, William	"Casual" Driver	$5.50
Ho, Helen	Driver	$5.50

Name	Classification	Wage Rates Per
Hokama, Natsuko	Coordinator	$1107/month
Ikezawa, Chihiro	Driver	$8.75
Ioane, Setsuko	"Casual" Guide	Piece-Rate
Ishii, Warren	Washperson	$3.50
Kaahanui, Jeremiah aka "Jerry"	Driver	$8.75
Kahoohalahala, George	Driver	$8.75
Kahue, Patrick K.	Driver	$8.75
Kanehailua, John A.	"Casual" Driver	$5.50
Kelly, Colin	Driver	$5.50
Keolanui, Emory, Jr.	Driver	$9.15
Kikuchi, Jenny	"Casual" Driver	Piece-Rate
Kobayashi, Tatsuyuki	Driver	$8.60
Kubiak, Michael	Driver	$8.95
Kusumoto, James	Maintenance	$8.00
Lackno, Wayne	Driver	$8.00
Lai, Jeannie	Guide/Coordinator	Piece-Rate
Manzanillo, Perfacto	Washperson	$4.15
Marler, Kyoko	"Casual" Guide	Piece-Rate
McShane, Dale	Driver	$8.75
Mito, Gerald	Driver	$8.80
Miyasaka, Gregg	Driver	$9.10
Moepono, Albert	Driver	$9.20
Moon, Blue	"Casual" Driver	$5.50
Morimoto, Seiya	Driver	$8.75
Mugiya, Kazue	Guide	Piece-Rate
Myers, Chizuko	Coordinator	$990/month
Nhomi, James	Driver	$9.00
Nishiyama, Mitsuo	Driver	$9.05
Norimoto, Sachiko	Guide	Piece-Rate
Nuuhiwa, Albert	Driver	$9.25
Okimoto, Bryan	Driver	$8.85
Pasion, Fred	Washperson	$3.35

Name	Classification	Wage Rates Per
Patlingrao, Danilo	Washperson	$3.80
Patubo, Eugene	Driver	$8.75
Peneku, Douglas K.	Driver	$8.85
Pihana, Daniel C.	Driver	$8.75
Shinsato, Karl	Coordinator	$900/month
Shrinski, Wallace	Driver	$8.80
Spellicy, Sayoko	Guide	$5.25
Stupplebeen, Bruce K.	Driver	$9.00
Sung, Chizuko	Guide	Piece-Rate
Taba, James	"Casual" Driver	$5.50
Tamura, James	"Casual" Driver	$8.25
Tarumi, Jeffrey	Coordinator	$5.25/hr.
Tamaru, Katsumi	Driver	$8.90
Tanaka, Emiko	Guide	Piece-Rate
Tanaka, Hideo aka "Gary"	Driver	$8.80
Tengan, Mutsuharu aka "Mutsu"	Driver	$9.00
Tsukayama, Eiko	Guide	Piece-Rate
Tsuruda, Clifford	Airport Coordinator	$5.85
Valente, Elsie U.	Driver	$5.50
Valera, Pedro	Washperson	$4.15
Valera, Ronaldo	Washperson	$3.70
Vieira, Robert	Driver	$6.00
Villatora, Eiko	Guide	Piece-Rate
Wada, Tadashi	"Casual" Driver	$8.50
Williams, Chiyoko	Guide	Piece-Rate
Winter, Kumiko	Guide	Piece-Rate
Yamamoto, Akemi	Guide	Piece-Rate
Yamamoto, Bessie	Coordinator	$6.75/hr.
Yasui, Keiko	Guide	Piece-Rate
Yeung, Hung-Ying	Driver	$8.55

Piece-Rate: Paid by the type of assignment.

APPENDIX C

Bernard Adams
Gregoria Ancheta
Alex Antonio
Eric Antonio
Santiago Antonio
Mark Borden
John Castello
Joseph Chai
Patrick Choo
Harold Crowell
Juan Fangon
Nicholas Foster
Ernest Glidden
Paul Gomes
Santiago Grande
Jeremiah Kaahanui
George Kahoohalahala
Patrick Kahue
John Kanehailua
Weilliam Kekuewa
James Kusumoto
Gerald Mito
Albert Moepono
James Nhomi
Mitsuo Nishiyama
Bryan Okimoto
Danilo Patlingrao
Douglas Peneku
Daniel Pihana
Wallace Shrinski
Bruce Stupplebeen
Hideo Tanaka
Mutsuharu Tengan
Pedro Valera
Ronaldo Valera
Robert Vieira

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1752

PHT, INC.
d/b/a POLYNESIAN HOSPITALITY TOURS,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Before: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

---

ORDER

[Filed Feb. 8, 1991]

Petitioner's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1752

PHT, INC.
d/b/a POLYNESIAN HOSPITALITY TOURS,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Before: Mikva, Chief Judge; Wald and Ruth B. Ginsburg, Circuit Judges

---

ORDER

[Filed Feb. 8, 1991]

Upon consideration of petitioner's petition for rehearing, filed January 22, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1752

PHT, INC.,
d/b/a POLYNESIAN HOSPITALITY TOURS,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Before: WALD, Chief Judge; MIKVA and RUTH B. GINSBURG, Circuit Judges

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JUDGMENT

[Filed Dec. 7, 1990]

These causes came on to be heard on the petition for review and cross-application for enforcement of an order of the National Labor Relations Board and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petition for review is denied and the cross-application for enforcement is granted, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

Date: December 7, 1990
Opinion *Per Curiam*

(2)

No. 90-1715

FILED
JUL 10 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

PHT, INC., d/b/a POLYNESIAN HOSPITALITY TOURS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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JERRY M. HUNTER
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NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

PETER WINKLER
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National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether substantial evidence supported the determination of the National Labor Relations Board that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging employees who engaged in a work stoppage to protest working conditions and unfair labor practices.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1715

PHT, INC., d/b/a POLYNESIAN HOSPITALITY TOURS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 920 F.2d 71. The decision and order of the National Labor Relations Board (Pet. App. 7a-101a) are reported at 297 N.L.R.B. No. 30.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1990. A petition for rehearing was denied on February 8, 1991. Pet. App. 103a. The petition for a writ of certiorari was filed on May 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner provides bus tours and ground transportation between airports and hotels in the Honolulu, Hawaii area. Pet. App. 2a, 14a-15a. In 1986, after several of petitioner's employees complained about their working conditions, a committee of employees began meeting regularly with representatives of petitioner to discuss those conditions. By the fall of 1986, employee morale had deteriorated to the point where petitioner convened a mandatory meeting with the employees' committee, to be held on September 9, 1986. At the meeting, management and the employees discussed subjects such as starting times, daily hours, and weekend days off. The employees also voiced the complaint that work assignments were made unfairly and based on favoritism. Thereafter, the employees reduced their complaints to writing and requested a written response. Petitioner never responded in writing, however, and its verbal response was deemed unacceptable by the employees. *Id.* at 48a-50a.

On October 10, 1986, the employees again met with petitioner's representatives and reiterated their complaints. Among other things, the employees complained that Operations Manager Gloria Sylva was assigning work unfairly and showing favoritism to particular employees. Although the employees did not demand that Sylva be terminated or transferred, management volunteered that Sylva was already scheduled to be transferred to another department. The next day, despite assurances given to the employees that their statements would be kept confidential, Sylva summoned one of the employees to her office and chastised him about the statements that he

and the other employees had made at the previous day's meeting. Pet. App. 23a, 50a-51a, 56a, 89a.

As the employees' concerns increased, Teamsters Local 996 (Union), which had lost a representation election in 1985, renewed its efforts to organize petitioner's employees. On October 22, 1986, the Union filed a representation petition with the National Labor Relations Board (Board). Pet. App. 13a, 48a, 51a. After learning of the petition, Operations Manager Sylva interrogated several employees about their own and other employees' union activities. *Id.* at 51a-52a, 69a-73a. The friction between management and the employees was exacerbated when petitioner suspended dispatcher William Kahihikolo for soliciting on behalf of the Union. On October 27, the Union filed an unfair labor practice charge protesting Kahihikolo's suspension. *Id.* at 9a, 51a-52a. On November 3, Sylva disciplined driver Larry Fujihana for soliciting on behalf of the Union. *Id.* at 53a-54a, 77a-80a.

b. By early November, the employees became frustrated over their unresolved complaints about working conditions and petitioner's interference with the employees' organizing activity. Accordingly, they decided to hold a work stoppage. Pet. App. 54a-55a. On the morning of November 10, the employees told the Union of their decision not to report for work that day and requested that a Union representative speak to petitioner on the employees' behalf. *Id.* at 55a-56a. In response, a Union representative met with petitioner's labor consultant, informed him of the employees' grievances, and requested that petitioner recognize the Union. *Id.* at 59a-60a.

Also on the morning of November 10, Sylva warned the employees gathered outside petitioner's premises that, if they did not return to work, they would be

disciplined, discharged, or permanently replaced. Later, Sylva told several of them that they were "terminated." Pet. App. 60a-61a, 75a. By noon, a number of employees had begun picketing with signs stating that petitioner was "unfair," and that there was a labor dispute between petitioner and the Union. The picketing continued for several days. *Id.* at 3a, 63a, 65a-66a. During the picketing, the employees shouted a variety of demands to petitioner's management, including the demand that Sylva be replaced, discharged, or removed from a position of supervising the employees. *Id.* at 3a, 63a-64a. On November 17, 1986, petitioner sent letters to most of the employees notifying them that their employment was terminated. *Id.* at 67a.

2. On charges filed by the Union, the Board's General Counsel issued a complaint, and, after a hearing, the administrative law judge (ALJ) found several violations of the National Labor Relations Act (Act). The Board affirmed those findings and found other violations, determining that petitioner had committed unfair labor practices by coercively interrogating employees about their union activities, in violation of Section 8(a)(1) of the Act, 29 U.S.C. 158 (a)(1);[1] discriminatorily enforcing its no-solicitation rule against union activity and disciplining an employee because of his union activity, in violation of

[1] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157. Under Section 7, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8(a)(1) and (3), 29 U.S.C. 158(a)(1) and (3);[2] and improperly threatening employees with discharge and then discharging them for engaging in protected activity when they stopped work, in violation of Section 8(a)(1) and (3). Pet. App. 7a-8a & nn. 1-2, 69a-91a.

The Board agreed with the ALJ's conclusion that the employees' work stoppage enjoyed protection under the Act because the employees were protesting working conditions and unfair labor practices. Pet. App. 8a n.2, 88a-89a. The ALJ rejected petitioner's contention that the employees stopped work in order to seek the discharge of Sylva; instead, the ALJ found that, in engaging in the work stoppage, the "employees were acting in concert to protest working conditions, and also to demonstrate support for the Union." *Id.* at 80a; see also *id.* at 75a (the employees were "withholding services * * * in concert with other employees in order to protest working conditions"); *id.* at 81a ("The employees were acting in concert to protest, and seek redress of, complaints about certain of their wages, hours and working conditions."); *id.* at 86a (the employees' " 'stop work' protest" was based not only on a "perception that an unfair labor practice had been committed" against a person later determined to be a supervisor, but also "to protest certain activities * * * regarded by employees as harassment"). Although acknowledging that "Sylva was a source of much concern among employees," the ALJ pointed out that the employees did not suggest

[2] Section 8(a)(3) makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

her removal; rather, petitioner had initiated the idea that Sylva be transferred to another position several weeks before the work stoppage began. *Id.* at 89a. The ALJ further found that the employees' "rude and vulgar" chants directed at Sylva from the picket line were in direct protest of Sylva's unfair labor practices and came only after her action in discharging them. *Id.* at 89a-90a. Against that background, the ALJ did not find that the objective of the work stoppage was to force her removal.[3]

The Board noted its agreement with the ALJ's finding that the stoppage was protected "for all the reasons stated by him." Pet. App. 8a n.2. The Board added that it had previously found that the Act protects "employees' concerted activities concerned with the selection or termination of a supervisor who has an impact on their working conditions." *Ibid.*, citing *Hoytuck Corp.*, 285 N.L.R.B. 904 (1987). In this case, the Board said, "it is abundantly clear from Sylva's own testimony that her performance of her duties as operations manager directly affected the working conditions of unit employees." Pet. App. 8a-9a n.2.

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[3] Petitioner also claimed that the employees had violated Section 8(b)(1)(B), 29 U.S.C. 158(b)(1)(B), which makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." In rejecting that claim, the ALJ noted that he knew of no authority that an employee, as opposed to a union, could violate that provision, and that, in any event, petitioner adduced no evidence that the employees desired to remove Sylva as petitioner's collective bargaining representative, rather than simply supporting her termination because of her unfair labor practices. Pet. App. 89a-90a.

3. The court of appeals enforced the Board's order. Pet. App. 1a-6a. Petitioner's main contention was that the work stoppage was not protected under Section 7 of the Act because its "real objective" was to have Sylva removed; petitioner claimed that the Act does not protect "employee protests concerning the composition of management personnel." Pet. App. 4a. Petitioner also suggested that the employees had attempted to force Sylva's removal because of her gender, and argued that employee actions to enforce such discrimination are not entitled to protection under the Act. *Ibid.*

The court, however, rejected petitioner's view of the employees' motives, and concluded that "substantial evidence supports the Board's finding that the employees engaged in the stoppage to protest working conditions and perceived unfair labor practices committed by the Company." Pet. App. 5a. Based on that determination, the court held that "the Board correctly concluded that the work stoppage constituted protected concerted activity, and that PHT violated the Act in discharging the employees." *Ibid.* Accordingly, the court found "no reason to reach, and hence express no opinion on, the section 7 status of protests relating to the selection, discharge, or replacement of supervisory personnel." *Ibid.*

ARGUMENT

1. Petitioner contends that review is warranted to address the questions (1) whether a strike aimed at procuring the discharge of a management official is protected by the Act, (2) whether a strike is protected if the employee's objection to the official is based on her gender, and (3) whether an employer commits an unfair labor practice by disciplining employees for a strike that is motivated by protected as well as unprotected reasons. Pet. i, 7. These issues, however, are not properly presented by the record in this case. This Court's review is therefore not warranted.

All three of petitioner's issues are premised upon a factual finding that the Board did not make: that the work stoppage by petitioner's employees was motivated in whole or in part by a desire to force the discharge of a management official, and that the employees pursued the official's removal because of her gender. The Board, however, did not find that the strike was motivated, even in part, for the purpose of procuring the discharge of a management official, or that the employees' protests were related to gender. To the contrary, the Board found that the work stoppage was intended to protest the employees' working conditions and petitioner's unfair labor practices—purposes that plainly constitute a protected basis for a strike. Correctly concluding that these findings were supported by substantial evidence (see pp. 11-12, *infra*), the court of appeals rejected petitioner's claim that 'the real objective of the employees' work stoppage" was to force the removal of a management official, and it therefore "s[aw] no reason to reach, and hence express[ed] no opinion on, the section 7

status of protests relating to the selection, discharge, or replacement of supervisory personnel." [4] Pet. App. 5a.

The third contention advanced by petitioner—that a strike exposes employees to discipline if any objective of the strike is unprotected—is barred for an additional reason. This issue was not raised before the Board. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extrordinary circumstances."

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[4] Although the issue is not properly raised in this case, we note that petitioner errs in claiming (Pet. 10) that the courts of appeals have entirely rejected the Board's position on employee protests over the discharge or retention of a supervisor. The Board considers such protests to be protected activity where the supervisor "has an impact on employee working conditions," but not where "employee concerted activity is designed solely to effect or influence changes in the management hierarchy." *Hoytuck Corp.*, 285 N.L.R.B. 904 n.3 (1987). Courts have agreed that employee protests over a supervisor because of the impact on working conditions can be protected, see, *e.g.*, *NLRB* v. *Oakes Machine Corp.*, 897 F.2d 84, 89 (2d Cir. 1990), but the courts have generally required consideration of the reasonableness of the means of concerted activity as well as the nature of the employees' objections in determining whether protests over management personnel are protected. See, *e.g.*, *Abilities & Goodwill, Inc.* v. *NLRB*, 612 F.2d 6, 8-10 (1st Cir. 1979); *Dobbs Houses, Inc.* v. *NLRB*, 325 F.2d 531, 537-538 (5th Cir. 1963). This case, of course, does not implicate that issue because the court of appeals accepted the Board's conclusion that the work stoppage was not designed to secure Sylva's discharge. Moreover, none of the cases cited by petitioner (Pet. 8-9 nn.2-10) involves a situation where, as here, employees were protesting unfair labor practices committed by a supervisor.

Although petitioner may now take the position (Pet. 5) that the work stoppage had both protected and unprotected objectives, before the Board petitioner argued that the sole objective of the work stoppage was Sylva's discharge; it made no claim that if the stoppage also had protected motives, the allegedly impermissible motive would still render the action unprotected.[5] Nor does petitioner make any effort to demonstrate the existence of "extraordinary circumstances" to excuse its failure to raise that mixed-motive issue before the Board, even on a petition for reconsideration or rehearing. Accordingly, there is no basis for petitioner to litigate that claim here. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (finding the court of appeals to be "without jurisdiction" to consider an issue not raised before the Board (on rehearing or otherwise), vacating the portion of the court of appeals' judgment addressing the issue, and remanding with instructions to dismiss); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 & n.10 (1979) (finding employer's "basic challenge" to be "foreclosed * * * by § 10(e) of the Act because of the Company's failure to raise it before the Board").[6]

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[5] See Pet. Amended Exceptions to Decision of the ALJ at 6, 7, 8 (Dec. 28, 1988); Pet. Br. in Support of Amended Exceptions at 4, 5, 23, 30-31, 36-37 (Dec. 28, 1988).

[6] Contrary to petitioner's contention (Pet. 22), the court of appeals did not find that because the strike was motivated in part by protected motives it was not necessary for the court to determine whether unprotected motives also existed. Rather, the court flatly rejected petitioner's assertion that the objective of the work stoppage was to cause "Sylva's removal." Pet. App. 4a-5a. In any event, even if the court of appeals had reached petitioner's claim, that would not relieve petitioner of the bar imposed by Section 10(e). See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. at 665-666.

2. The only issue properly presented on this record is whether the court of appeals correctly concluded that substantial evidence supported the Board's findings. Assuming that factbound issue to be "fairly included" within the questions presented, Sup. Ct. R. 14.1(a), it does not warrant further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). The court of appeals correctly held that the Board's findings are amply supported by the record.

The ALJ found that in the months preceding the work stoppage, petitioner's employees had complained to petitioner about various working conditions, including starting times, daily hours, weekend days off, and favoritism shown by Operations Manager Sylva in assigning work. Petitioner responded to these complaints in part by telling the employees that Sylva was slated to be transferred. When the employees' discontent with their working conditions grew and they resumed their efforts to unionize, petioner suspended a dispatcher, disciplined an employee engaged in solicitation, and—through Operations Manager Sylva—coercively interrogated several employees about union activity. When the employees discussed those events with Union representatives, they were told that the Union had already filed an unfair labor practice charge and was thinking of establishing a recognitional picket line. Frustrated by the pace of events, petitioner's recalcitrance, and Sylva's obstruction of their efforts to organize, the employees decided to withhold their services in protest.

Contrary to petitioner's assertion (Pet. 19 & n.23) that the Board misapplied the law to the "undisputed facts" that petitioner's employees sought to force Sylva's removal and that they did so because of her

gender, the Board did not find that the employees' objective was to oust Sylva or that their objections to her were based on gender.[7] It is true that much of the employees' anger was directed at Sylva, and that some of the picketing employees urged that she be transferred or terminated. But the ALJ, affirmed by the Board, found that the employees' reason for making those statements was their perception that Sylva engaged in favoritism and had committed unfair labor practices. Pet. App. 89a-90a. Petitioner itself had initiated the concept of transferring Sylva; the statements made by employees endorsing her transfer (or termination) came some weeks later, after the work stoppage had begun and Sylva had told them they were discharged. *Id.* at 89a. Accordingly, the Board properly found that the employees' comments made on the picket line did not establish that the purpose for the stoppage was to remove Sylva from management.

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[7] In upholding the ALJ's findings, the Board noted that it has previously "found to be protected employees' concerted activities concerned with the selection or termination of a supervisor who has an impact on their working conditions," and that Sylva's duties directly affected working conditions in this case, Pet. App. 8a n.2, but the Board did not question the ALJ's factual finding that the employees were not seeking Sylva's removal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 90-1715

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PHT, INC., d/b/a POLYNESIAN HOSPITALITY TOURS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

As reflected in the Petition for a Writ of Certiorari, this case presents three related issues arising under the National Labor Relations Act concerning the rights of employees who strike to force their employer to discharge a senior female management official. These issues are: (1) whether the Act protects an employee strike to force the discharge of any supervisory or managerial official; (2) whether an employer may discipline employees who strike to force the discharge of a female management official because of her sex; and (3) whether an employer may discipline employees who engage in a strike to force the discharge of a senior female management official, where there are other, protected motives for the strike.

In opposing certiorari, Respondent fails to address the merits of these issues. Resorting to legalistic sleight of hand, Respondent now argues that the striking employees never sought the termination of Operations Manager

Gloria Sylva and therefore none of these issues are properly before the Court.[1] Respondent also argues that Court review is partially precluded by Section 10(e) of the Act, 29 U.S.C. § 160(e), because Petitioner allegedly did not raise before the Board its contention that the protected aspects of the strike did not privilege the employees' otherwise unprotected motives. Respondent's arguments do not withstand scrutiny.

I. THE EMPLOYEES' EFFORTS TO CAUSE SYLVA'S TERMINATION ARE UNDISPUTED IN THE RECORD.

In the decisions below, neither the Board nor the Administrative Law Judge disputed the fact that the striking employees sought the termination of Operations Manager Gloria Sylva. Rather, this fact essentially was conceded by all, with the debate centering on the reasons or justification for such conduct. Relying upon an interpretation of the Act that has been unanimously rejected by every court of appeals to have considered the issue, the Board and Administrative Law Judge found as a matter of law that such an objective constituted protected activity. Pet. App. 8a n.2, 90a. If, as Respondent now argues, the Board was of the view that the employees were not so motivated, it need only have so stated.[2] Such a factual

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[1] Respondent's argument that the striking employees did not seek the termination of Operations Manager Gloria Sylva is belied in its own brief. Twice Respondent cites findings adopted by the Board demonstrating that the employees sought Sylva's termination. Resp. Br. 6 n.3, 12; Pet. App. 89a-90a. Rather than dispute the employees' objectives, the referenced findings attempt to justify the employees' efforts as protected activity. Pet. App. 8a n.2, 90a. It is this legal conclusion that is the subject of the Petition for a Writ of Certiorari.

[2] Even assuming that such a finding were made, it clearly would not be supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The evidence showing that the employees were motivated, at least in part, by a desire to rid themselves of Sylva is overwhelming. The Administrative Law Judge found that the picketers chanted "Hidey, hidey, ho, the bitch has

finding, if it existed, normally would be entitled to great deference, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). *However, there is no such factual finding in the record.*[3]

In the absence of a specific finding, the Board's conclusions must be inferred from the circumstances of the proceedings below and the contemporaneous actions of the Board. The Board adopted the decision of the Administrative Law Judge which credited all of the evidence demonstrating that the employees sought Sylva's termination. Moreover, the Board did not dispute Petitioner's argument that the employees were so motivated, and the Board specifically stated that such a motivation was protected under its interpretation of the Act. Pet. App. 8a

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got to go" (Pet. App. 64a, 65a), the Charging Party's business manager said "we are going to call this the Gloria strike" (Pet. App. 65a), and one of the leading strikers said that the employees were declining to come to work because of [Sylva], that they wanted her "out" (Pet. App. 73a).

The ALJ also found that the employees did, in fact, call for the replacement of Sylva in a rude, even discourteous or obscene fashion (Pet. App. 64a). Furthermore, the record contains an audiotape of the picketers chanting: "All you gotta do is fire her. All you got to do is fire her, that's easy to do. All you got to do is say one name, that's all. All you have to do is fire her, that's very easy to do. All you say is fired." J.A. 432, Petition for Review of a Decision and Order of the National Labor Relations Board, D.C. Cir. (October 25, 1990). Finally, the transcript of the hearing demonstrates that even after Sylva was transferred to a different department, the picketers were not satisfied, they wanted her "out, out." J.A. 250 (October 25, 1990).

[3] Without record citation, Respondent closes its brief with the statement "[a]ccordingly, the Board properly found that the employees' comments made on the picket line did not establish that the purpose for the stoppage was to remove Sylva from management." *However, the Board made no such finding.* As explained *infra*, due to the Board's myopic view of employee efforts to affect changes in supervision, any findings on this critical issue must be inferred from the record. The record does not support the inference proposed by Respondent.

n.2. The inescapable conclusion is that the Board was satisfied that the employees sought Sylva's termination, but considered such conduct to be protected.

This interpretation of the law was the primary issue raised before the court of appeals below. It was briefed and argued vigorously by both parties. Indeed, in its brief to the court of appeals, Respondent conceded that the employees sought Sylva's termination.[4] Thus, Respondent's argument in opposition to certiorari is a radical departure from its position taken below. Under these circumstances, questions concerning the legal impact of the various motives/objectives of the strike are squarely presented by the record in this case.

Respondent's revisionist view of the record below highlights one of the problems presented by the bifur-

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[4] Respondent's position below is reflected in the following excerpts from its brief to the court of appeals:

> [T]he Company focuses on the employees' desire to effect the transfer or discharge of Sylva, and argues that the work stoppage was therefore unprotected. The Company, however, mischaracterizes the decision of the Board, *which found that the employees' concerns over Sylva were but one of their reasons for protesting.* In any event, the employees' concerns with Sylva, who had committed the earlier unfair labor practices and who scheduled employee assignments, were directly related to their working conditions, and *their attempts to remove her are covered by Section 7 of the Act's protection* of "concerted activities for the purpose of . . . mutual aid or protection . . . ."

NLRB Br. 18, On Petition for Review and Cross-Application for Enforcement, D.C. Cir. (September 27, 1990) (emphasis added).

* * * *

> Moreover, *even acknowledging that the transfer or discharge of Operations Manager Sylva was among the employees' objects in stopping work, as the Board found [Pet. App. 8a n.2], that object would not render the employees' conduct unprotected here. . . .* In any event, Sylva's conduct was but one of the causes of the work stoppage, and the Board reasonably found that the other causes of the work stoppage also satisfied the statutory test of concerted activity for mutual aid or protection.

NLRB Br. 31 (September 27, 1990) (emphasis added).

cated regulatory environment maintained by the Board in this area of the law. In blindly adhering to its view that the Act protects all employee efforts to cause the discharge of management officials who "affect working conditions," the Board fails to analyze the issues in the context of the law as interpreted by the various courts of appeals. The result inevitably is that key findings must be inferred from the record. Any such "deficiencies," however, are attributable directly to the Board and its handling of such cases. Respondent should not be permitted to rely upon its own shortcomings to escape Court review.

II. ALL ISSUES RAISED IN THE PETITION FOR A WRIT OF CERTIORARI WERE PRESENTED TO THE BOARD BELOW.

Relying upon this Court's decisions in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982), and *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), Respondent asserts a jurisdictional objection to review of the issue of whether an employer may discipline employees who engage in a strike to force the discharge of a senior female management official, where there are other, protected motives for the strike. Respondent maintains that this dual motive issue was not raised before the Board, and therefore judicial review is precluded by Section 10(e) of the Act, 29 U.S.C. § 160(e).

The record clearly demonstrates that the dual motive issue was presented to the Board below. This is perhaps most vividly shown by the following excerpt from Petitioner's Brief in Support of Amended Exceptions to Decision of the ALJ (Dec. 28, 1988):

> [Petitioner] suggests that a careful analysis of *Damon House* [270 NLRB 143 (1984)] reveals that the Board actually utilized a Wright-Line type test [*Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981), *cert. den.*, 455 U.S. 989 (1982)] to determine (in cases involving a mixed motive fact pattern)

whether the discharge of employees engaged in concerted activities designed to cause the removal of a high level Section 2(11) supervisor is unlawful. Assuming this to be true, [Petitioner] contends that it has affirmatively established that its discharge of employees that engaged in the November 10, 1986 "stop work meeting" was based upon three entirely lawful reasons:

1) the employees' complaints against Gloria Sylva centered on their sexist attitude about working for a woman, and in essence, unlawfully demanded [Petitioner] to discriminate against her in violation of Title VII of the Civil Rights Act of 1964;

2) the [Petitioner] had a right to resist its employees' efforts to cause the removal of a high level manager who performed grievance adjustment functions within the meaning of Section 8(b)(1)(B) of the Act; and

3) as a matter of business judgment, [Petitioner] could not allow the employees' unprotected workstop to shut down its operations.

Thus, even assuming, *arguendo*, that the General Counsel could show that there were some matters with respect to Gloria Sylva's identity as a supervisor that employees could demonstrate directly impacted their job interests, thereby rendering those matters protected, (a claim which [Petitioner] argues is without foundation in the record) under the Board's Wright-Line analysis, [Petitioner] has nevertheless established that the *"overall thrust"* of the employees' actions on November 10, 1986 were unprotected. Accordingly, [Petitioner] could lawfully discharge the employees for engaging in said unprotected activities.

Pet. Br. in Support of Am. Exc. to Dec. of ALJ, at 39-40 (Dec. 28, 1988). Thus, Respondent's assertion that the dual motive issue was not raised before the Board is utterly without support.

Moreover, Respondent's reliance on *Woelke & Romero* and *Detroit Edison* is misplaced. In *Woelke & Romero*, the Board had decided an issue not specifically presented to it by the parties. The Court held that because the employer had not challenged the Board's disposition of this issue through a motion for reconsideration or rehearing, Section 10(e) precluded judicial review. 456 U.S. at 666. In *Detroit Edison*, the employer, before the Board, failed to challenge a specific finding made by the ALJ. The Board adopted this finding, but ordered a different remedy. Before the Supreme Court, the employer attempted to raise an objection to this previously unchallenged finding. The Court found that Section 10(e) precluded review of this finding. 440 U.S. at 311.

The instant case presents the converse situation. Here, the Petitioner specifically challenged the key findings of the ALJ and presented the dual motive issue to the Board for decision.[5] However, the Board, ignoring consistent court of appeals decisions to the contrary, continued to adhere to its position that a strike to cause the termination of a supervisor who "affects working conditions" is protected under the Act. Thus, the Board considered all motives for the strike to be protected, and did not consider or express its view on the dual motive issue. Absent a finding or discussion by the Board, Petitioner had no opportunity to challenge the Board's unarticulated position on possible dual motives.[6] Indeed, it was the court of appeals which first pursued the dual motive rationale when it enforced the Board's order without regard to the

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[5] Even assuming that the issue had not been expressly presented to the Board in Petitioner's brief, the question of dual motives necessarily was implicated by Petitioner's argument that the employees' efforts to oust Sylva were unprotected. Thus, the Board had sufficient notice of the dual motive issue. *See, e.g., Local 900, International Union of Electrial, Radio and Machine Workers, AFL-CIO v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984).

[6] Even assuming that Section 10(e) otherwise was applicable, this alone would satisfy the "extraordinary circumstances" exception alluded to by Respondent.

unprotected status of the employees' efforts to cause Sylva's termination.

The purpose of Section 10(e) is to put the Board on notice and to insure that "all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board." *NLRB v. Cheney California Lumber Co.*, 327 U.S. 385, 389 (1946). The arguments addressed in the briefs before the Board certainly were adequate to put the Board on notice of Petitioner's position that the striking employees were subject to discipline even if the work stoppage had both protected and unprotected motives.[7] Contrary to Respondent's contention, Petitioner has steadfastly maintained its position at every stage of the proceedings, with increasing detail and analysis as the litigation progressed. Section 10(e) of the Act does not preclude Court review of this issue.

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[7] *See May Department Stores v. NLRB*, 326 U.S. 376, 386 n.5 (1945) (the specificity required for a claim to escape the bar imposed by Section 10(e) is that which shall "apprise the Board of an intention to bring up the question").

CONCLUSION

For the reasons stated above and in its original petition, PHT, Inc. respectfully submits that the judgment of the court of appeals should be reversed.

Respectfully submitted,

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